Supreme Court, U.S.
FILED
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CLERK

No. 96-779

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

RICHARD D. MARKS*
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PETITION FOR CERTIORARI FILED NOVEMBER 19, 1996
CERTIORARI GRANTED MARCH 17, 1997

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No. 96-779

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Relevant Docket Entries in the U.S. District Court Western District of Arkansas (Fort Smith)

Date	Filings
10/19/92 1	COMPLAINT, w/jury demand (11 Summons(es) issued & retd to pro se litigant f/svc) (msj) [Entry date 10/20/92]
10/19/92 2	MOTION by plaintiff Ralph P Forbes for immediate emergency hearing (msj) [Entry date 10/20/92]
10/19/92 5	MOTION by plaintiff Ralph P Forbes for declaratory judgment (msj) [Entry date 10/20/92] [Edit date 12/18/92]

10/20/92 7	ORDER by Honorable H. F. Waters denying motion for temporary restraining order/preliminary injunction [3-1] [2-1]. (cc: Forbes, HFW) (msj)
10/21/92 8	NOTICE OF APPEAL by plaintiff Ralph P Forbes from District Court decision re: order [7-1] dated 10/20/92 (msj)
10/22/92 9	TRANSMITTAL LETTER to USCA, 8th Circuit (msj)
10/26/92 10	ORDER (copy) by 8th Circuit Chief Judge Richard S. Arnold denying appellant's motion f/injunctive relief pending appeal (cc: all counsel by 8th Cir) (msj)
10/26/92 11	ORDER (USCA, 8th Circuit) affirming the decision of the District Court [8-1] (cc: all counsel) (msj)
11/2/92 12	AMENDED COMPLAINT [1-1] by plaintiff Ralph P Forbes; jury demand; adding KHBS TV/Channel 40, KHOG TV/Channel 29, ABC (msj)
11/10/92 13	MOTION by defendants Susan J Howarth, Victor Fleming, GE Campbell, Caroline Whitson, Diane Blair, S McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L Oliver, and Bill Clinton to dismiss complaint, demand for declaratory judgment, and emergency temporary restraining order (th)

11/10/92 14	MEMORANDUM BRIEF by defendants Susan J Howarth, Victor Fleming, GE Campbell, Caroline Whitson, Diane Blair, S McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L Oliver, and Bill Clinton in support of motion to dismiss complaint, demand for declaratory judgment, & emergency temporary restraining order [13-1] (th)
12/4/92 17	RESPONSE by plaintiff Ralph P Forbes to defendants KHBS, KHOG, and ABC's motion to dismiss case [15-1], and to defendants Susan Howarth, Victor Fleming, G.E. Campbell, Dr. Caroline Whitson, Diane Blair, S. McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L. Oliver, and William Clinton's motion to dismiss [13-1] (th)
12/17/92 18	LETTER by Honorable H.F. Waters dd 12/16/92, re: defts' motions to dism (rw)
12/17/92 19	ORDER by Honorable H.F. Waters granting defts' motion to dismiss case [15-1], granting motion to dismiss [13-1] dismissing case w/prej (cc: all counsel) (rw)
12/29/92 20	NOTICE OF APPEAL by plaintiff Ralph P Forbes from District Court decision, re: order [19-2] dated 12/17/92 (cc: opposing counsel) (msj)
12/29/92 22	TRANSMITTAL LETTER to USCA, 8th Circuit (msj)

1/8/93 23	SCHEDULING ORDER from USCA; Appellate Docket Number 93-1031WAFS (msj)
2/1/93 26	TRANSMITTAL LETTER to USCA, St. Louis, MO (msj)
2/1/93 27	ORDER (USCA, 8th Circuit) on petn f/rehearing on 1st appeal; dismissing appeal as moot; remanding to district court w/instructions to vacate its order denying preliminary inj relief on merits & to enter a new order denying motion f/preliminary inj as moot (cc: all counsel) (msj)
7/1/94 28	OPINION of USCA, 8th Circuit re appeal [20-1] (jrs)
7/1/94 29	JUDGMENT (USCA, 8th Circuit) affirming in part, and reversing and remanding in part the Decision of the District Court [Appeal [20-1] (cc: all counsel); appeal record return ddl set for 7/15/94 (jrs)
7/8/94 --	ORIGINAL FILE returned from U.S. Court of Appeals (msj)
7/12/94 30	ANSWER by defendant Bill Clinton, defendant Amy L Oliver, defendant Lillian Springer, defendant Jerry McIntosh, defendant James Ross, defendant S McAdams, defendant Diane Blair, defendant Caroline Whitson, defendant GE Campbell, defendant Victor Fleming, defendant Susan J Howarth, defendant AR Ed

	Telecommun, defendant AR Ed Television Com to complaint & and complaint [12-1], [1-1] (msj)
5/5/95 --	VOLUME II BEGINS (th)
5/5/95 46	MOTION by defendants Bill Clinton, Amy L Oliver, Lillian Springer, Jerry McIntosh, James Ross, S McAdams, Diane Blair, Caroline Whitson, GE Campbell, Victor Fleming, Susan J Howarth, AR Ed Telecommun, AR Ed Television Com to amend the case caption (th)
5/5/95 47	MOTION by dfts Bill Clinton, Amy L Oliver, Lillian Springer, Jerry McIntosh, James Ross, S McAdams, Diane Blair, Caroline Whitson, GE Campbell, Victor Fleming, Susan J Howarth, AR Ed Telecommun, AR Ed Television Com to dismiss G.E. Campbell and S. McAdams as dfts (th)
5/5/95 48	MEMORANDUM BRIEF by dfts Bill Clinton, Amy L Oliver, Lillian Springer, Jerry McIntosh, James Ross, S McAdams, Diane Blair, Caroline Whitson, GE Campbell, Victor Fleming, J Howarth, AR Ed Telecommun, AR Ed Television Com in support of motion to dismiss G.E. Campbell and S. McAdams as dfts [47-1] (th)
5/19/95 --	VOLUME III BEGINS (th)

5/19/95 60	RESPONSE by plaintiff Ralph P Forbes to motion to amend the case caption [46-1], w/attachments (rw)
5/23/95 65	ORDER by Honorable H.F. Waters granting motion to dismiss G.E. Campbell and S. McAdams as dfts [47-1] party GE Campbell, party S McAdams granting motion to amend the case caption [46-1] dismissing party John Does denying petitions to join as pltfs & members of an injured class (cc: all counsel) (rw)
5/23/95 --	Docket Modification (Utility Event) per Order this date, granting motion to dismiss Steve Barnes & Gene Goss as parties subject to requests for admission by pltf [56-1] substituting Lavenia Craig, Robert Doubleday as Commissioner,, terminating Larry Foley, Carol Adornetto, Bill Simmons, Oscar Eugene Goss, Steve Barnes, John Does, ABC, KHOG TV/Channel 29, KHBS TV/Channel 40 as captioned dfts (msj)
5/25/95 68	RESPONSE by defendant Bill Clinton, defendant Amy L Oliver, defendant Lillian Springer, defendant Jerry McIntosh, defendant James Ross, defendant Diane Blair, defendant Caroline Whitson, defendant Victor Fleming, defendant Susan J Howarth, defendant AR Ed Telecommun, defendant AR Ed Television Com to motion to amend the case caption [46-1] (rw)

6/5/95 --	COURT RECORDING; dt of proceedings 6/5/95; Location of tapes - Fayetteville (ct) [Entry date 06/07/95]
6/5/95 96	CLERK'S NOTES: TRIAL TO JURY (HFW) (day 2) (ct) [Entry date 06/07/95]
6/6/95 95	CLERK'S NOTES: TRIAL TO JURY (HFW) (day 1) Jury trial begins (ct) [Entry date 06/07/95]
6/6/95 --	COURT RECORDING; Location of tapes - Fayetteville (ct) [Entry date 06/07/95]
6/7/95 94	MOTION by dft to revise jury instructions and interrogatory (th)
6/7/95 97	CLERK'S NOTES: TRIAL TO JURY (HFW) (day 3) Jury returns verdict. (ct)
6/7/95 98	VERDICT against plaintiff Ralph P. Forbes (ct)
6/7/95 --	COURT RECORDING; dt of proceedings 6/7/95; Location of tapes Fayetteville (ct)
6/9/95 99	JUDGMENT: by Honorable H.F. Waters pursuant to jury verdict [98-1]; dismissing case with prejudice (cc: all counsel) (th)
6/19/95 100	NOTICE OF APPEAL by plaintiff Ralph P Forbes from District Court judgment [99-2] dated 6/9/95 (cc:

opposing counsel, ECRO) (msj) [Entry date 06/20/95]

6/20/95 102 TRANSMITTAL LETTER to USCA, 8th Circuit (msj)

Relevant Docket Entries in United States Court of Appeals for the Eighth Circuit

7/7/95 Civil Case Docketed. (dlb)

7/7/95 CERTIFIED copies notice of appeal, docket entries, and orders dated 6/9/95 and 6/29/95. [95-2722] [592220] (dlb)

7/7/95 RECORDS received: Original File, consisting of 4 Volume(s), Location St. Louis. [95-2722] (dlb)

8/4/95 MOTION of aplees, AR Educational, AR Educational, Susan J. Howarth, Victor Fleming, Dr. Caroline Whitson, Diane Blair, James Ross, Jerry McIntosh, Lillian Springer, Bill Clinton, for Hearing En Banc. [95-2722] [602807] w/service 8/2/95 (jpp)

8/9/95 ORDER filed: Appellees the Arkansas Educational Television Commission, the Arkansas Educational Telecommunications Network Foundation, Susan J. Howarth, Amy Oliver, Victor Fleming, Dr. Caroline Whitson, Diane Blair, James Ross, Jerry McIntosh, Lillian Springer, Lavenia Craig, Robert Doubleday, and William Clinton's motion for initial hearing en banc is hereby ordered taken with the

case for consideration by the panel to which this case is submitted for disposition on the merits. [603943] (jpp)

9/1/95 APPEARANCE for appellant, attorney Charles Suphan, J. Fred Hart [95-2722] [614846] (dlb)

9/8/95 CASE is no longer pro se. [95-2722] (jpp)

11/21/95 BRIEF FILED - Brief of Appellees - AR Educational, et al. 50 pages -- 10 copies - with service 11/20/95. [95-2722] [642358] (jpp)

11/21/95 RECORDS received: Appendix filed by Appellees AR Educational consisting of 1 Volume(s), 3 Copies. [95-2722] (jpp)

11/21/95 MOTION of amicus curiae, Organization of State Broadcasting Executives (OSBE) for leave to file amicus curiae brief on behalf of Appellees. [642736] w/service 11/20/95 (skh)

11/21/95 BRIEF TENDERED - Brief of Amicus-Curiae - on behalf of Organization of State Broadcasting Executives - 13 pages - 10 copies w/service 11/20/95. (skh)

11/22/95 ORDER filed: Motion of Organization of State Broadcasting Executives for leave to participate as amicus curiae in support of the appellees has been filed. Parties are notified that absent the filing

	of a formal objection 10 days, the motion will be deemed as granted. [95-2722] [642739] (skh)
12/5/95	BRIEF FILED - Brief of Amicus-Curiae - on behalf of Appellant. Organization of State Broadcasting Executives 3 pgs - 10 copies w/service 11/20/95. [95-2722] [647718] (jpp)
12/5/95	Clerk letter sent granting motion for leave to appear as amicus and filed brief [95-2722] (jpp)
12/6/95	JUDGE ORDER: The appellees' initial petition for hearing en banc is denied. Judge McMillian would grant the petition. [602807-1] filed by AR Educational, AR Educational, Susan J. Howarth, Victor Fleming, Dr. Caroline Whitson, Diane Blair, James Ross, Jerry McIntosh, Lillian Springer, Bill Clinton. [95-2722] [648264] (jpp)
12/6/95	BRIEF FILED - Reply brief - Ralph P. Forbes. 11 pgs - 10 copies - w/service 12/4/95. [95-2722] [648353] (jpp)
12/28/95	Brief Correction(s) received from Appellant Ralph P. Forbes. Correction(s): separately bound appendix. [95-2722] (jpp)
12/28/95	RECORDS received: Appendix filed by Appellant Ralph P. Forbes consisting of 1 Volume(s), 3 Copies. [95-2722] (jpp)

2/29/96	*SET FOR ARGUMENT* - April 1996 in St. Louis. [95-2722] (dgh)
4/11/96	ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Richard S. Arnold, Chief Judge, Theodore McMillian, Circuit Judge, John R. Gibson, Circuit Judge. J. Fred Hart for Appellant Ralph P. Forbes. Richard D. Marks for Appellees Robert Doubleday, Appellees Lavenia Craig, Appellees Larry Foley, Appellees Carol Adornetto, Appellees Oscar Eugene Goss, Appellees Steve Barnes, Appellees ABC, Appellees KHOG/TV Channel 29, Appellees KHBS TV/Channel 40, Appellees John Does, Appellees Bill Clinton, Appellees Amy L. Oliver, Appellees Lillian Springer, Appellees Jerry McIntosh, Appellees James Ross, Appellees S. McAdams, Appellees Diane Blair, Appellees Dr. Caroline Whitson, Appellees G.E. Campbell, Appellees Victor Fleming, Appellees Susan J. Howarth, Appellees AR Educational, Appellees AR Educational. Rebuttal by : Mr. Hart. Recorded. [95-2722] (rmh)
8/21/96	THE COURT: Richard S. Arnold, Theodore McMillian, John R. Gibson. OPINION FILED by Richard S. Arnold PUBLISHED. [95-2722] [747652] (dms)
8/21/96	JUDGMENT: Richard S. Arnold, Theodore McMillian, John R. Gibson: The judgment of the lower court is

	REVERSED and REMANDED in accordance with the opinion. [95-2722] [747655] (dms)
9/3/96	MOTION of aplee AR Educational Television, to stay mandate pending filing of certiorari. [95-2722] [751630], TO COURT. w/service 8/30/96 (ema)
9/11/96	Supplement to Motion for stay of mandate from Richard D. Marks for Appellees Robert Doubleday, Appellees Lavenia Craig, Appellees Larry Foley, Appellees Carol Adornetto, Appellees Oscar Eugene Goss, Appellees Steve Barnes, Appellees ABC, Appellees KHOG/TV Channel 29, Appellees KHBS TV/Channel 40, Appellees John Does, Appellees Bill Clinton, Appellees Amy L. Oliver, Appellees Lillian Springer, Appellees Jerry McIntosh, Appellees James Ross, Appellees S. McAdams, Appellees Diane Blair, Appellees Dr. Caroline Whitson, Appellees G.E. Campbell, Appellees Victor Fleming, Appellees Susan J. Howarth, Appellees AR Educational, Appellees AR Educational. TO COURT. [95-2722] (ema)
9/26/96	JUDGE ORDER: denying appellee motion to stay mandate filed by AR Educational Television Commission. A couple of observations may be helpful. First, the defendants are free, to the extent provided by law, to cover bona fide news events, including candidate debates organized by people or groups

	other than the defendants. Second, no question with respect to write-in candidates was presented or decided in this case. [751630-1] [95-2722] [761290] (mls)
9/26/96	MANDATE ISSUED [95-2722] (mls)
9/27/96	RESPONSE of aplnt, Ralph P. Forbes, in opposition to appellee motion to stay mandate filed by AR Educational (with supporting memorandum). See order of 9/26/96. No action taken regarding response. [751630-1] [95-2722] [763544]. (ema)
10/3/96	RECEIPT for Mandate. [95-2722] [766108] (dms)
10/17/96	Record Sent out of the office to lower court at the end of appellate proceedings. Records Included: 4 Vol. OF; 3 Vol. TR; 2 Envelopes Exh. [95-2722] (mls)
11/29/96	U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 11/19/96. Supreme Ct. Case No.: 96-779 [95-2722] [785481] (dms)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT, FORT SMITH DIVISION

No. 92-2190

Ralph P. Forbes and the People	*	
	*	
-VS-	*	EMERGENCY
	*	
The Arrogant Orwellian	*	CIVIL RIGHTS
Bureaucrats of the Arkansas	*	
Educational Television	*	CLASS ACTION
Commission Network	*	
Foundation and Its Board of	*	CIVIL ACTION
Directors in Their Official	*	
Capacities;	*	
	*	
The Arkansas Educational	*	
Telecommunications and Its	*	
Members and Officers;	*	
	*	
Susan J. Howarth, in her	*	
official capacity as Executive	*	
Director;	*	
	*	
Victor Fleming, in his official	*	
capacity as Chairman;	*	
	*	
G.E. Campbell, in his official	*	
capacity as Vice Chairman;	*	
	*	

Dr. Caroline Whitson, in her	*
official capacity as Secretary;	*
	*
Commissioner Diane Blair,	*
in her official capacity;	*
	*
Commissioner S. McAdams, in	*
his official capacity;	*
	*
Commissioner James Ross, in	*
his official capacity;	*
	*
Commissioner Jerry McIntosh,	*
in his official capacity;	*
	*
Commissioner Lillian Springer,	*
in her official capacity;	*
	*
Amy L. Oliver, in her	*
official capacity as Production	*
Manager	*
	*
William Clinton, in his official	*
capacity as Governor of the State	*
of Arkansas;	*
	*
and certain "John Doe" Crooked,	*
Lying Politicians and Political	*
"Dirty Tricks" Operatives;	*
	*
The Special Interests That	*
Control the Politicians and	*
Exert Illegal Influence on	*
AETN;	*
	*

Defendants

Filed: October 19, 1991

COMPLAINT FOR CONSPIRACY AGAINST THE PEOPLE TO DENY THEM OF THEIR RIGHT TO KNOW AND TO ROB THEM OF THEIR BIRTHRIGHT TO ELECT REPRESENTATIVES OF THEIR OWN CHOICE

WITH DEMAND FOR ACCELERATED CONSIDERATION AND EXPEDITED INJUNCTIVE RELIEF by SEPARATE and INCORPORATED TRO and DECLARATORY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT, FORT SMITH DIVISION

No. 92-2190

Ralph P. Forbes and the People	*	
	*	EMERGENCY
-VS-	*	CIVIL RIGHTS
	*	CLASS ACTION
The Crooked Lying Politicians;	*	CIVIL ACTION
	*	NO. 92-
The Orwellian Bureaucrats of AETN;	*	
	*	
The Special Interests:	*	
	*	
Certain Media "Personalities" Who Have Sold Out the People and Betrayed the Ethics and Principles of Professional Journalism;	*	
	*	
and Governor Clinton of the State of Arkansas;	*	
Defendants	*	

COMPLAINT AGAINST BUREAUCRATS AND POLITICIANS WHO CONSPIRE TO DEPRIVE THE PEOPLE OF THEIR RIGHTS AND LIBERTIES

WITH DEMAND FOR ACCELERATED CONSIDERATION AND EXPEDITED INJUNCTIVE RELIEF BY TEMPORARY RESTRAINING ORDER and DECLARATION OF RIGHTS PRIOR TO OCTOBER 22nd, 1922

COMES NOW, RALPH P. FORBES, Plaintiff Pro Se on behalf of himself, and The People of Arkansas and the Voters of the 3rd district, and states the following:

THE DEFENDANTS HAVE CONSPIRED, jointly and severally, to Violate the Constitutions and laws of the United States and OF the State of Arkansas, respectively, and to transgress the rights of the people and destroy their right to free and independent self-government by denying the people their most fundamental rights to be informed and to vote effectively for their own enlightened self interests;

The defendants have conspired under color of law to deprive the people of their rights in numerous ways in a continuing defiance of the People, Law, Justice and Rights.

Defendant AETN is currently staging a so-called congressional "debate" that they plan to broadcast on October 22nd at 7:00 p.m., in which they are unconstitutionally and unlawfully excluding Independent Candidate Ralph P. Forbes that requires an immediate Declaration of Rights and Temporary Restraining Order to protect the people's rights, the integrity of the election and the rights of Candidate Forbes from irreparable harm as more fully shown in the separate motions and briefs.

THE PLAINTIFFS

WE, THE PEOPLE, are that class of Persons, who are endowed by our Creator with certain inalienable and indefeasible Rights, in whom reside ultimate political power and sovereignty under God.

Defendants are unlawfully discriminating against that class of Citizens who petitioned to have the name of Forbes placed on the ballot as the people's Independent Candidate to represent the 3rd district in the United States Congress, and by denying equal rights to broadcasting opportunities on AETN, a television network owned by the People of Arkansas, they are trespassing against the rights of all Arkansans.

The election is approximately two weeks from the filing of this case. Plaintiff Forbes is campaigning night and day. But the blatant transgression against the people and Forbes by AETN has left Plaintiff Forbes no option but to turn to this court to protect his rights, the rights of the voters and the integrity of the electoral process.

BRIEF STATEMENT OF THE CASE

This case arises because of a systematic and general conspiracy by the Defendants, under color of law, to deny the Plaintiffs and all American Citizens their basic Constitutional Rights by unlawfully changing this constitutional Republic of Law into a soviet-like dictatorship in which party bosses, bureaucrats, and powerful special interests shall alone have the power to decide who may or may not run for elective office; and to deny the American People their fundamental Rights protected by the First Amendment by censoring ideas and opinions that do not conform their own plans for post-American "new world order."

The Defendants have continuously conspired to deprive the American People in general, the Voters of Arkansas and the third district, in particular, and the Plaintiff-in-chief, Independent Candidate Ralph Forbes of their most basic political Rights secured by the First Amendment to the United States, as more fully shown in this Complaint.

BRIEF STATEMENT OF THE FACTS

1. The people and Ralph Forbes have had their rights flagrantly and blatantly violated in a continuing pattern of abuse under color of law for many years.

2. In 1990 Forbes won 53% of the statewide vote in a 3-way race, carrying 72 of Arkansas' 75 counties and all 16 counties of the 3rd district by absolute majorities.

3. Certain of the defendants conspired against the people by wholesale bartering of bloc votes in Pulaski County and elsewhere to prevent the maverick populist Tommy Robinson off of the gubernatorial ballot. This same vote tampering forced Forbes into an unnecessary runoff election.

4. The runoff election was an avalanche of dirty tricks and violations of law, including certain of the defendants paying certain operatives thousands of dollars to wage a war of dirty tricks, lies, physical attacks against Forbes and to violate his rights and the rights of the voters by any means to prevent Forbes' election.

UNLAWFUL SELECTIVE AND DISCRIMINATORY CLOSING DOWN OF PRO-FORBES POLLING PLACES

5. When it appeared that all their attacks were backfiring and Forbes would be elected certain of the defendants systematically and selectively closed down more than 75% of the polling places, required by law to be open, in the 72 counties carried by Forbes.

Violation of Equal Protection Clause of Fourteenth Amendment

6. These Defendants denied Plaintiffs and their class, the grass-roots Arkansas Voters equal access to the ballot box and right of franchise in order to impair and Plaintiffs' rights of expression and association because of Plaintiffs status as probable Voters for Forbes.

7. Defendants, acting under color of state law for all times relevant to this lawsuit, knowingly and willfully discriminated against Plaintiffs by not allowing them equal access to polling places.

8. Denying persons equal access to use public facilities due to their political beliefs or activities impairs these persons' rights of political expression and association and violates the equal protection clause of Fourteenth Amendment.

9. In 1986 Forbes won 63% of the vote in a statewide primary. Certain Defendants publicly boasted it didn't matter how the people voted, they would stop Forbes from winning.

10. Plaintiff Forbes apologizes to the court for the hasty manner in which this complaint had to be prepared, and he begs leave to amend this pleading by being more particular in the multitude of invasions of rights by the defendants and the continuing violations of 42 U.S.C. 1981, et seq.

11. Plaintiffs have been damaged as a result of said discrimination and will be irreparably damaged if such unlawful behavior is allowed to continue and are entitled to an injunction prohibiting further unlawful actions and are entitled to damages, costs, and attorney's fees.

12. Defendants acting under color of state law for all times relevant to this lawsuit, subjected Plaintiffs to deprivation of rights secured by the United States Constitution.

13. Defendants knowingly and willfully damaged Plaintiffs by impairing their constitutional rights by in effect banning Plaintiffs from exercising rights to political expression in a public fora all over the State.

14. Defendants knowingly and willfully denied Plaintiffs' equal rights to expression and association in order to damage Forbes because of their status as likely to vote for Forbes.

15. Plaintiffs have been damaged by Defendants' actions and are entitled to an injunction prohibiting further unlawful actions and are entitled to damages, costs, and attorneys fees.

RELIEF DEMANDED

WHEREFORE, This Court should declare that each and every Voter in Arkansas who has been denied their right to vote, or to cast an informed, effective ballot by the unlawful actions of the defendants is entitled to statutory judgment of $10,000.00 each for each act of impairment, deprivation or denial of their right to vote pursuant to 42 USC 1981, et seq.

And, such other remedial, punitive, and exemplary damages as a jury shall find just and proper.

Respectfully submitted,

/s/ Ralph P. Forbes

Ralph P. Forbes
in propia persona,

Box 88, London, AR 72847
501/293-4641

VERIFICATION

State of Arkansas
SS County of Pope

I, Ralph P. Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

/s/ Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this 19 Day of Oct., 1991.

My Commission expires June 30, 1996.

/s/ Karen P. Forbes
Karen P. Forbes
Notary Public

CERTIFICATE OF SERVICE

I, /s/ Ralph P. Forbes, verify that I have served true and correct copies of the foregoing to the Defendants and/or their counsel at the following addresses believed by me to be their place of business, this 19th Day of October, 1992, by hand or by U.S. mails as appropriate:

Ms. Susan Howarth, Executive Director
AETN
350 S. Donaghey
Conway, AR 72032
501/682-4118 or 501/450-1727

Attorney General Winston Bryant
200 Tower Building
323 Center St.
Little Rock, AR 72201
501/682-2007

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph P. Forbes and The People	*	
	*	
-VS-	*	Emergency Civil Rights
	*	Class Action
The Arrogant Orwellian Bureaucrats of the AETN;	*	Civil Action
The Crooked Lying Politicians;	*	No. 92-2190
The Special Interests; Including Certain Media "Personalities" Who Have Sold Out the People and Betrayed the Ethics and Principles of Professional Journalism; and Governor Clinton of the State of Arkansas;	*	
	*	
	*	
	*	
	*	
	*	
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	*	
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	*	
	*	

Defendants

Filed: November 2, 1992

AMENDED COMPLAINT

COMES NOW, RALPH P. FORBES, as next best Friend of the People of Arkansas and that class of persons who are the legally qualified Voters of Arkansas' 3rd congressional district, and amends the pleadings to include commercial television broadcasting stations KHBS TV/Channel 40 UHF; its affiliate KHOG TV/Channel 29 UHF; The American Broadcasting Company aka ABC; and their agent Darrel Cunningham as additional defendants in the above styled matter.

The pleadings are herein adopted and realleged as if set out in full and every allegation is incorporated herein, and further cause of action is herein alleged against additional defendants as stated.

16. Plaintiff Forbes, a Citizen of the United States and the State of Arkansas with natural, God-given Rights secured by their respective Constitutions, is the legal Independent candidate for the office of Representative of Arkansas third congressional district. In the course of his campaign on behalf of the People, Taxpayers and *all* Persons in Arkansas he contracted with the defendants KHBS TV, et al, to run ads to educate and inform the Electorate and General Public of the facts his views that our problems were forewarned by our forefathers, and that we can only solve our problems by returning to our roots: America is and of right ought to be a Christian Nation; and that God cannot bless a nation with the sin of blood guilt on their hands.

17. The People are the sovereign power, under God, in the United States and in the State of Arkansas. The People have an inherent right to [a] choose their own representatives; and [b] be

fully informed, especially when they decide for themselves how to cast their ballots in important general elections. At least 174,185 voters from Arkansas' third congressional district cast ballots in the last gubernatorial election in 1990. This year they also have the right to cast ballots for the president of the United States and for a United States senator, so it is anticipated an even greater number of persons will vote on November 3rd. A large number of potential voters are disenchanted with the democratic process, and it is generally agreed that they will be aroused to participate by hearing new ideas, new candidates and new choices.

New Parties, Jurisdiction and Venue

18. Defendants KHBS TV and its sister affiliate KHOG TV are for profit corporations, affiliates of the American Broadcasting Company aka ABC and are licensed by the Federal Communications Commission and all conduct business throughout the State of Arkansas and the irreparable injuries against the people and plaintiff Forbes occurred with the third congressional district which lies with both the eastern and western judicial districts of Arkansas. In return for the extraordinary power, privilege and opportunity for profit temporarily bestowed upon them by the people entrusting them with a monopoly over the channel 29 and channel 40 broadcasting bands, respectively, the Defendants must comply with Title 47 USCA, Section 315 of the United States Code which states in pertinent parts:

"...such licensee shall have no power of censorship over the material broadcast under the provisions of this section."

"Nothing in the foregoing sentence shall be construed as relieving broadcasters ... from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

19. Defendants are bound also by the Constitutions of the United States and the State of Arkansas, the Law of the Land, the lawful

courts, the FCC and its rulings, including FCC 8210-AJZ/MJM dated 21 August 1992 and attached hereto and incorporated herein and marked as Plaintiffs' #16.

20. Petitioner Forbes is a candidate for United States Congress and it is a great hardship and excessive burden upon him to be forced to leave the campaign trail to write legal pleas to protect his rights and the rights of the people.

21. It was the great and irreparable harm inflicted on the people and Candidate Forbes by AETN defendants that forced Forbes to file this complaint at this time. However, that injury by AETN is only one in "a long train of abuses and usurpations, pursuing invariably the same object (a supplanting of government by the people, of the people and for the people with government by the bureaucrats, of the politicians and for the special interests, which) evinces a design to reduce (the people) under absolute Despotism," it is the petitioner's right, it is the petitioner's duty to defend the people and their rights and to provide new Guards for their future security. {Paraphrased from our Declaration of Independence}

22. Petitioner Forbes, who is not backed by any PACs or special interests, caused to be produced a number of television ads to attempt to communicate his messages in less than 30 seconds.

23. Forbes caused to be delivered a preliminary version of the ads on 3/4" video tape to a number of commercial broadcast and cable television stations throughout the 3rd district, including KHOB TV.

24. These tapes contained the basic footage showing that aborticide kills babies, the ugly truth and fact that Forbes' political opponents do not want the American people to know.

25. At approximately 2:30 - 3 p.m. on Friday, October 30, 1992, Candidate Forbes brought a copy of the final version of his ads to KHOG affiliate in Fort Smith at.

26. Forbes gave the tape to Nancy Dolan who told Forbes the station could not legally censor nor refuse his spots, but they had to check them for certain technical specifications as to timing, scan lines, etc.

27. After waiting a long period of time, during which stations KHBS/KHOG TV broadcast programs containing materials that Forbes and millions of other Christians deem offensive, indecent, immoral and just plain garbage, at approximately 4:00 p.m. CST Defendant Cunningham asked Forbes to come into his office and close the door.

28. Defendant Cunningham then told Forbes he could not air his Pro-Life ads. Forbes protested that it was his right to run his ads. Defendant Cunningham said he had just been on the telephone with his lawyer and that the FCC had just issued a new ruling giving station management the power to relegate materials they subjectively decide as "indecent" to the "safe harbor" hours between 11:00 p.m. and 6:00 a.m.

29. Forbes then cited the facts in FCC 8210-AJZ/MJM on 21 August, 1992. Forbes then related that congressional candidate Michael Bailey had already had his footage showing the "products" of aborticide approved by the FCC in April and July of this year and the FCC had ruled such pictures were *not* "indecent," and that Forbes' footage was taken from the Bailey ads, but that Forbes had not included all of the footage, but only a portion of the permissible pictures. Forbes also told defendant Cunningham that similar ads had been challenged in federal courts and that the courts had ruled the spots were protected by the First Amendment. Defendant Cunningham said in effect that he did not care what the law or the courts said he was censoring and refusing Forbes' ads.

Please see Plaintiff's attachment, Letter from Candidate Bailey plus a video copy of the Bailey ads marked as Plaintiffs' #17.

30. Defendant Cunningham said that Forbes could move his spots from the chosen time periods to the late "safe harbor" times. Forbes protested that he picked the times he bought based on reaching the largest number of potential voters and forcing him to move to the undesirable times would irreparably harm his campaign. Defendant Cunningham said that was fine by him and said he would never run Forbes' ads in the favorable time slots. Forbes refused to give up his prime spots, but bought additional "safe harbor" slots under protest.

31. Forbes immediately attempted to call the FCC in Washington DC but the telephones were not answered.

Forbes repeated his efforts throughout the weekend, but the FCC was closed.

32. Friday night, October 30th, Forbes attempted to get justice by calling the clerk of court and the magistrate at the U.S. Courthouse in Fort Smith. Forbes was told no judge would be available to help him until Monday morning.

33. Forbes also called the federal court in Little Rock and eventually reached Circuit Judge Morris Arnold who was working after hours. Judge Arnold is an appellate judge and has no authority to issue injunctive relief in the first instance.

34. Saturday morning Forbes reached Indiana congressional candidate Michael Bailey. Bailey told Forbes that the FCC ruling did not apply to Forbes' Pro-Life ads, but that someone issued a misleading interpretation at the close of business hours and that apparently TV stations all over the country were given information they could use as a pretext to censor all Pro-Life ads during the final critical hours of the campaign because it would be at least late Monday before the mess could be corrected; and by then it would be too late and the harm to Pro-Life candidates nationwide would be irreparable However, as station management was notified of the facts they decided the Pro-Life spots could not be censored, denied or "moved to the back of the 'prime time' bus."

These stations include WAVE and WHAS 11 in Louisville/Cincinnati; the Denver stations, etc.

Please see Plaintiffs' attachment, newspaper article from page 4A of Sunday's, (November 1st) Arkansas Democrat Gazette marked as Plaintiffs' #18.

Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

First Amendment to the United States Constitution

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment to the United States Constitution

Candidate Forbes, has an equal right to accommodations, rights and privileges secured under the 14th Amendment to the United States Constitution and the Constitution of Arkansas as any other Citizen.

35. Plaintiff Forbes has suffered irreparable harm because of the unlawful, wicked, selective and invidious decision of KHBS defendants.

36. The most fundamental rights of the People to choose their own representatives based on informed consent have been flagrantly trespassed by the KHBS defendants.

This Complaint embraces and must comprehend a long string of abuses and pattern of continuing conspiracy against the people and their rights. The instant case against KHBS TV, et al, as

more fully shown is further proof of the arrogance and malice of this wicked conspiracy against the people and their inherent rights to choose their own representatives based upon their informed consent. And, therefore, Petitioner Forbes requires at least thirty (30) days past the election of November 3rd to adequately prepare his pleadings and he stipulates that no defendant is required to answer the complaint until after they have received the fully amended pleadings;

But, particular defendants must answer emergency petitions for injunctive relief that require immediate relief as a direct result of their violations of rights.

Therefore, from all of the above the newly added Defendants, KHBS/KHOG TV, ABC and its agent, Mr. Cunningham, have caused irreparable harm to the People by defrauding the People and robbing them of their fundamental birthright to be a free and independent self-governing people by censoring the political ads of plaintiff Ralph Forbes, the Independent Candidate, the only candidate who was put on the ballot by petition of the People to Represent them in the House of Representatives.

Wherefore, Petitioner prays that, in addition to punitive, remedial and exemplary damages to be decided by a jury and RICO treble damages if it be shown there was a criminal conspiracy by defendants, KHBS/KHOG-TV and ABC and Defendant Cunningham be penalized in accordance with 42 USC 1981, et seq., and appropriate provisions of Title 18 that award damages of $10,000 to persons whose civil rights have been violated, and that a Voter's Rights Trust Fund be established, funded by Two Billion Dollars ($2,000,000,000.00) in penalties from the defendants to see that each and every voter in Arkansas' third congressional district whose rights to Freedom of Information have been violated by the defendants will be compensated by law with an award of Ten Thousand Dollars ($10,000.00) *to each and every Voter in the third district.*

Respectfully submitted,

/s/ Ralph P. Forbes

Ralph P Forbes
in propia persona,
Box 88, London, AR 72847
501/293-4641

VERIFICATION

State of Arkansas
SS County of Pope

I, Ralph Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

/s/ Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this 2 Day of Nov., 1992. My Commission expires June 30, 1996.

/s/ Karen P. Forbes
Karen P. Forbes
Notary Public

CERTIFICATE OF SERVICE

I, *Ralph Forbes*, verify that I have served true and correct copies of the foregoing to the Defendants and/or their counsel at the following addresses believed by me to be their place of business, this 2th Day of November, 1992, by hand or by U.S. mails as appropriate:

ABC; KHOG TV & KHBS TV
c/o Mr. Darrel Cunningham
Box 4150
Ft. Smith, AR 72914
501/783-4040

American Broadcasting Company
1330 Avenue of Americas
New York, NY 10019

Ms. Susan Howarth, Executive Director
AETN
350 S. Donaghey
Conway, AR 72032
501/682-4118 or 501/450-1727

Attorney General Winston Bryant
200 Tower Building
323 Center St.
Little Rock, AR 72201
501/682-2007

Plaintiff's Exhibit 16

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

21 AUG 1992

IN REPLY REFER TO:

8210-AJZ/MJM

Vincent A. Pepper, Esquire
Counsel, Gillett Communications of Atlanta, Inc.
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

Irving Gastfreund, Esquire
Kaye, Scholer, Fierman, Hays & Handler
901 - 15th Street, N.W.
Suite 1100
Washington, D.C. 20005

Dear Messrs. Pepper & Gastfreund:

This is in reference to the "Petition for Declaratory Ruling" filed on behalf of Gillett Communications of Atlanta, Inc. ("Gillett"), licensee of television station WAGA-TV, Atlanta, Georgia, as well as the "Petition for Declaratory Ruling" filed by Kaye, Scholer, Fierman, Hays & Handler ("Kaye Scholer"), a law firm representing "numerous" unnamed television and radio stations. These petitions both claim that federal candidate anti-abortion political advertisements featuring dead fetuses and fetal tissue depict excretory activity and are therefore indecent. Consequently, they seek our concurrence that channelling the advertisements to hours when children are unlikely to be in the audience would be consistent with the "reasonable access" and

"no-censorship" provisions of the Communications Act of 1934, as amended (Sections 312(a)(7) and 315, respectively).

Factual Background

Gillett poses the following question:

> Whether a licensee may channel a use by a legally-qualified federal candidate to a safe harbor when children are not generally present in the audience if the licensee determines in good faith that the proposed use is indecent or otherwise unsuitable for children.

Gillett states that certain political advertisements feature graphic depictions of dead fetuses and that the candidate-sponsors of these advertisements have sought and obtained broadcast time on WAGA-TV pursuant to the reasonable access (2) provisions of Section 312(a)(7). For example, Gillett states that Daniel Becker, legally qualified Republican candidate for Congress, placed a political advertisement on WAGA-TV, which aired on July 19, 1992, at 7:58 p.m., and that the ad included depictions of dead fetuses. Gillett has provided a tape of the advertisement. Gillett asserts that, because such candidate appearances are "uses," under Section 73.1941(b) of the Commission's Rules, WAGA-TV must air them uncensored under the no-censorship provision of Section 315 of the Communications Act of 1934, as amended. Gillett argues that this and similar advertisements are indecent under 18 U.S.C. § 1464 and that, to avoid prosecution under the indecency statute, licensees should be allowed to "channel" them to times when there is no reasonable risk of children in the audience. Gillett believes the material in Becker's tape, as well as the depictions in other candidate advertisements it anticipates receiving, which feature dead fetuses covered with "menstrual gore," constitute "excretory activity." As such, Gillett would have the Commission find them indecent.

Kaye Scholer advances a similar argument not tied to a specific political advertisement, but with respect to an entire class of programming "containing graphic and shocking depictions of dead, bloodied or aborted fetuses or of any other similar graphic and shocking depictions of excised or bloody fetal tissue." Kaye Scholer requests that even if we determine that such content does not constitute "excretory activity" under the indecency definition, we defer to a licensee's reasonable good faith judgment that such content is indecent and that it should therefore be channelled to times when there is no longer a reasonable risk that children are in the audience.

Discussion

To the extent these petitions seek a general ruling by the Commission that a class of program material -- that is, any depiction of dead fetuses or fetal tissue -- is indecent, we decline to so rule. Such a broad, case-independent determination would be inconsistent with the Commission's long-held view that indecency determinations must be based on the specific factual context in which the allegedly offensive material appears. The declaratory nature and prospective application of the relief that petitioners request are also at odds with Commission decisions that have declined to render indecency rulings in advance of broadcasts to avoid imposing prior restraints on protected speech. See Letter to William J. Byrnes, Esquire (WBAI(FM)), 63 RR 2d 216 (MMB 1987), review denied sub nom. Pacifica Foundation, Inc., FCC 87-215, released June 16, 1987; Letter to Christian Action Network, (MMB) released June 12, 1992.

Similarly, we cannot accept petitioners' suggestion that broadcasters be permitted to classify political use material as (3) indecent so that they may restrict the time at which it airs even where it does not meet the Commission's indecency definition. Nor can we permit a broadcaster to alter the scheduling of such material because the broadcaster finds it otherwise "unsuitable" for children. Such channelling would

violate a federal candidate's reasonable access rights under Section 312(a)(7) of the Act, which requires broadcasters to permit legally qualified candidates "reasonable access" to their facilities. As a general matter, broadcasters may not direct candidates to unwanted times of the day or evening. We have also ruled that candidates are entitled to access to "prime time." Report and Order in the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079, 1090 (1978). Although federal candidates are not entitled access to specific programs, such as news programming, (Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678, 682 (1991)), they cannot be banned from entire dayparts. 68 FCC 2d at 1091. Therefore, the practice of channelling material that is not indecent, even if content-neutral (i.e., channelling all federal candidates to specific times of the day or evening when there may be no reasonable risk of children in the audience) would deprive federal candidates of their rights to determine how best to conduct their campaigns. See CBS, Inc., 453 U.S. 367 (1981).[1] Similarly, such channelling could impinge upon the rights of state or local candidates to equal opportunities under Section 315.

Accordingly, we decline to grant the general declaratory relief that petitioners seek. As noted earlier, however, Gillett

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1 In fact, Gillett would have us adopt a policy eroding a federal candidate's reasonable access right to prime time by restricting those candidates to placement during the "later hours of prime time." This represents a much broader restriction than might be occasioned even if we were to apply the indecency restrictions to the material at issue. Pending further Commission action defining an appropriate "safe harbor" (see Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991)), indecency enforcement is currently restricted to material aired between 6:00 a.m. and 8:00 p.m. See Kansas City Television, Ltd., 4 FCC Rcd 6706 (1989).

has submitted a tape of a specific political advertisement, prepared on behalf of a legally qualified federal candidate, that has already been broadcast by WAGA-TV pursuant to the reasonable access provisions of Section 312(a)(7) of the Act and which includes depictions of dead fetuses. In the context of this past broadcast, we believe it is appropriate to respond to petitioner's request for an indecency determination.

Gillett asserts that the advertisement at issue contains "six shots of aborted fetuses" . . . badly discolored in whole or (4) in part, [some of which] appear covered with a wet, dark, shiny substance," and that this constitutes a depiction of "excretory activity" within the scope of the Commission's indecency definition. We do not agree.

The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

Upon review of the tape submitted by Gillett, we conclude that the advertisement is not indecent. We decline to rule that what is involved here is an "excretory activity" under the indecency definition. Neither the expulsion of fetal tissue nor fetuses themselves constitutes "excrement."[2] Petitioners have

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2 Webster's Dictionary defines "excrement" as "waste material, especially fecal matter, expelled from the body after digestion." Webster's II New Riverside University Dictionary, p. 451 (1984). (continued...)

not provided Commission precedent that would bring images such as those at issue here within the definition of "excretory" (and, therefore, the definition of indecency) and we are not inclined to expand that definition sua sponte.[3]

Finally, although we find the broad prospective relief that petitioners seek to be inconsistent with the "reasonable access" provision of the Act, we do not believe broadcasters are without recourse in providing their viewers with appropriate warnings where, in the licensees' good faith judgment, the material presented in a political use program could be disturbing to child viewers. In the circumstances presented here we would not regard such an advisory, presented in a non-editorializing and neutral (5) fashion, to either violate the no-discrimination rules of Section 73.1940(c) or to invoke the political editorializing provisions of Section 73.1930. An example of an acceptable viewer advisory would be: "The following political advertisement contains scenes which may be disturbing to children. Viewer discretion is advised." We believe that, in view of Commission and congressional interest in serving the special needs of children, see, e.g., Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd 2111 (1991)), such advisories represent a reasonable

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2 (...continued)
Federal case law has been similarly restricted in scope. See, e.g., L.M. Communications, 7 FCC Rcd 1595 (MMB 1992); FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

3 Because we decline to find this political advertisement indecent, we need not reach the issue of whether the criminal indecency statute, 18 U.S.C. Section 1464, overrides either the provisions of Section 315 or the reasonable access provision of Section 312(a)(7) of the Act. See Letter from Mark S. Fowler to Honorable Thomas A. Luken, released January 19, 1984 (staff advisory opinion indicating that certain types of speech may not be subject to the Section 315 no-censorship provision).

accommodation between protection of the child audience and potential conflicts with the provisions of the political broadcasting regulations.[4]

In view of the foregoing, the requests for declaratory ruling by Gillett Communications of Atlanta, Inc., and Kaye, Scholer, Fierman, Hays & Handler ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Roy J. Stewart

Roy J. Stewart, Chief
Mass Media Bureau

202 632- _ _ 60

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4 The Bureau has determined that the selective use of general disclaimers, such as "these views are not necessarily the views of the station," in connection with political advertisements is not permissible under the Commission's anti-discrimination policies because such use could be construed as an endorsement of one candidate over another. See Southern Arkansas Radio Company, 5 FCC Rcd 4643 (MMB 1990). We do not believe, however, that the selective, good-faith use of an audience advisory concerning material in political advertisements that is potentially disturbing to children presents a similar risk. Accordingly, we do not find the "equal treatment" requirements applicable to general disclaimers to pose any bar to the well-considered and selective use of audience advisories in circumstances such as those considered here.

Plaintiff's Exhibit 17

BAILEY
FOR LIFE FOR
CONGRESS

September 25, 1992

Ralph Forbes
Forbes for Congress Committee
P.O. Box 88
London, AR 72847

Dear Mr. Forbes:

We are grateful to God for you and your commitment to the causes bigger than ourselves! You have my full and unconditional permission to use the enclosed tape featuring eight political commercials during this 92 election cycle.

In the service of Jesus Christ,

/s/ Michael E. Bailey

Michael E. Bailey

P.O. Box 264 • Georgetown, Indiana 17122 • (812) 952-3184

Plaintiff's Exhibit 18

Arkansas Democrat Gazette
• SUNDAY, NOVEMBER 1, 1992•

Ads showing abortions wrongly removed from prime-time slots, candidates say

The Associated Press

WASHINGTON -- Candidates opposed to abortion said Saturday that local television stations are misinterpreting a judge's ruling and illegally removing their political ads from prime viewing times.

The stations said the ruling allows them to reschedule indecent ads that have offended viewers.

Television stations which had been airing spots for U.S. Senate candidates Chad Koppie of Illinois and Matt Noah of Colorado notified the candidates Friday that they would no longer broadcast the ads showing aborted fetuses during daytime and prime-time hours.

Noah is a member of the Christian Pro-Life Party and Koppie is running under the Conservative Party of Illinois banner.

The decisions by WAND-TV of Decatur, Ill., and KUSA-TV and KMGH-TV of Denver followed a memo from the National Association of Broadcasters advising stations what to do in light of a federal court ruling and Federal Communications Commission opinion late Friday against another, more graphic 30-minute "infomercial" for a candidate opposed to abortion in Georgia.

"My ads are only similar (to the Georgia ad) in that abortion is the theme," said Noah, who added that he will take

legal action against the Denver stations if they don't put his ads back on the air.

The ad for Daniel Becker, the Republican candidate for Georgia's 9th Congressional District seat, shows an abortion taking place and was ruled "indecent" programming that could be restricted to the hours between midnight and 6 a.m.

That time slot is the only time in which programming that graphically depicts sexual or excretory organs can be broadcast.

U.S.-District Judge Robert Hall's ruling that WAGA-TV in Atlanta could limit broadcasts of Becker's ad was backed by a letter from the FCC's mass media bureau.

This led to the National Association of Broadcasters memo advising television station executives nationwide to consider the Georgia decision and contact their lawyers before acting against any similar ads on their stations.

United States District Court
Western District of Ark.

Forbes & The People SUMMONS IN A CIVIL ACTION

V. CASE NUMBER: 92-2190

The Arrogant Orwellian's
Bureaucrats, et al

TO: (Name and Address of Defendant)

Mr. David Cunningham
KHBS-TV
Box 4150
FT Smith AR 72914

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon PLAINTIFF'S ATTORNEY (name and address)

Ralph P. Forbes Prose
Bx 88
London AR 72847 501 293-4

as answer to the complaint which is herewith served upon you, within -20- days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[illegible stamp] NOV 2 1992
CLERK DATE

/s/ [illegible signature]
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph P. Forbes and The People *
*
Plaintiffs *
*
v. *
*
The Arrogant Orwellian *
Bureaucrats of the Arkansas *
Educational Television *
Commission Network *
Foundation and its Board of *
Directors in their Official *
Capacities; The Arkansas *
Educational *
Telecommunications and its *
Members and Officers; *
Susan J. Howarth, in her *
official capacity as Executive *
Director; Victor Fleming, *
in his official capacity as *
Chairman; G.E. Campbell, *
in his official capacity as *
Vice Chairman; Dr. Caroline *
Whitson, in her official *
capacity as Secretary; *
Commissioner Diane Blair, *
in her official capacity; *

Commissioner S. McAdams, in his official capacity; Commissioner James Ross, in his official capacity; Commissioner Jerry McIntosh, in his official capacity; Commissioner Lillian Springer, in her official capacity; Amy L. Oliver, in her official capacity as Production Manager; William Clinton, in his official capacity as Governor of the State of Arkansas; and certain "John Doe" Crooked, Lying Politicians and Political "Dirty Tricks" Operatives; the Special Interests That Control the Politicians and Exert Illegal Influence on AETN

Defendants

Filed: November 10, 1992

MOTION TO DISMISS

Come the separate defendants, Susan J. Howarth, Victor Fleming, G.E. Campbell, Dr. Caroline Whitson, Diane Blair, S. McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L. Oliver, and William Clinton, and for their motion to dismiss the Complaint, Demand for Declaratory Judgment and Motion for Emergency TRO pursuant to Rule 12(b)(1), (2) and (6), state as follows:

I.

The Court lacks jurisdiction over the subject matter and persons of the separate defendants under the Eleventh Amendment to the United States Constitution as to plaintiff's claim for damages.

II.

Plaintiff fails to state a claim upon which relief can be granted as follows:

(a) Plaintiff Forbes does not possess the interest and does not share the claimed injury of the members of the purported class pursuant to Rule 22, Federal Rules of Civil Procedure;

(b) Plaintiff Forbes has no First or Fourteenth Amendment right to appear on a public television political debate;

(c) Plaintiff Forbes has no personal claim or cause of action under the Federal Communications Act to appear on a public television political debate;

(d) Plaintiff has failed to state a claim against defendant Oliver;

(e) Plaintiff has failed to state a claim against defendant Clinton;

(f) Plaintiff has failed to state a claim under 42 U.S.C. § 1981 et seq.;

(g) The date and election at issue herein have passed and the issues regarding the appearance on the public television debate have become moot;

III.

This Court lacks jurisdiction of or should not exercise its jurisdiction over any claims under the state law.

WHEREFORE, the separate defendants move the Court to order that the plaintiff's complaint be dismissed in its entirety and for all other proper relief.

Respectfully submitted,

WINSTON BRYANT
Attorney General

By: /s/ Thomas S. Gay by TH
THOMAS S. GAY, #77053
Senior Assistant
Attorney General
323 Center St., Suite 200
Little Rock, AR 72201-2610
(501) 682-2007

Attorneys for Separate
Defendants

CERTIFICATE OF SERVICE

I, Thomas S. Gay, certify that a copy of the foregoing document has been served by U.S. Mail, postage prepaid, this 9th day of November, 1992, to Ralph P. Forbes, Box 88, London, AR 72847.

/s/ Thomas S. Gay by TH
Thomas S. Gay

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph P. Forbes and The People	*
	*
Plaintiffs	*
	*
v.	*
	*
The Arrogant Orwellian	*
Bureaucrats of the Arkansas	*
Educational Television	*
Commission, and its Board of	*
Directors in their Official	*
Capacities; KHBS TV Channel	*
40; KHOG TV Channel 29 and	*
Darrell Cunningham, in his	*
individual capacity; et al.	*
	*
Defendants	

Filed: December 17, 1992

ORDER

On this 16th day of December, 1992, upon consideration of defendants' motions to dismiss, the court finds for the reasons set forth in a letter of even date that said motions should be and hereby are granted and this case is dismissed with prejudice.

IT IS SO ORDERED.

/s/ H. Franklin Waters
United States District Judge

This document entered
on docket in compliance
with Rule 58 and 79(a),
FRCP,
on 12/17/92 by /s/

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph Forbes *
*
Plaintiff *
*
v. *
*
The Arrogant Orwellian *
Bureaucrats of the Arkansas *
Educational Television *
Commission Network *
Foundation and its Board of *
Directors in their Official *
Capacities; The Arkansas *
Educational *
Telecommunications and its *
Members and Officers; *
Susan J. Howarth, in her *
official capacity as Executive *
Director; Victor Fleming, *
in his official capacity as *
Chairman; G.E. Campbell, *
in his official capacity as *
Vice Chairman; Dr. Caroline *
Whitson, in her official *
capacity as Secretary; *
Commissioner Diane Blair, *
in her official capacity; *

Commissioner S. McAdams, in *
his official capacity; *
Commissioner James Ross, in *
his official capacity; *
Commissioner Jerry McIntosh, *
in his official capacity; *
Commissioner Lillian Springer, *
in her official capacity; *
Amy L. Oliver, in her *
official capacity as Production *
Manager; William Clinton, *
in his official capacity as *
Governor of the State of *
Arkansas; and certain *
"John Doe" Crooked, Lying *
Politicians and Political *
"Dirty Tricks" Operatives; *
the Special Interests That *
Control the Politicians and *
Exert Illegal Influence on *
AETN *
*

Defendants

Filed: July 11, 1994

ANSWER

Come the defendants, Arkansas Educational Telecommunications Network Foundation and its Board, in their official capacities, Arkansas Educational Telecommunications Commission, its members and officers, Susan J. Howarth in her official capacity as Executive Director; Victor Fleming in his official capacity as Chairman; G. E. Campbell in his official capacity as Vice Chairman; Dr. Carolyn Whitson in her official

capacity as Secretary; Commissioner Diane Blair in her official capacity; Commissioner S. McAdams in his official capacity; Commissioner James Ross in his official capacity; Commissioner Jerry McIntosh in his official capacity; Commissioner Lillian Springer in her official capacity; Amy L. Oliver in her official capacity as Production Manager; and William Clinton in his official capacity as Governor of the State of Arkansas (hereinafter referred to as "AETN defendants"), by counsel, and for their response to plaintiff's complaint, amended complaint and all other pleadings herein, state as follows:

1. AETN defendants admit that the Arkansas Educational Telecommunications Commission ("the Commission") was created by the Arkansas General Assembly by Act 198 of 1961, A.C.A. § 6-3-101 et seq.; the Commission holds licenses from the Federal Communications Commission (F.C.C.) to broadcast public television stations comprising the Arkansas Educational Telecommunications Network (AETN).

2. AETN defendants admit that the Arkansas Educational Telecommunications Network Foundation was created in 1984; its purposes include, but are not limited to, to obtain, hold, invest, reinvest and administer funds and other property for the benefit of AETN.

3. The AETN defendants admit that during the time period of August 17, 1992, through October 22, 1992, Susan J. Howarth was Executive Director of AETN.

4. AETN defendants admit that during the time period of August 17, 1992, through October 22, 1992, Amy L. Oliver was Production Manager for AETN.

5. AETN defendants admit that during the time period August 17, 1992, through October 22, 1992, Defendants Fleming, Whitson, Blair, Ross, McIntosh, and Springer were Arkansas Educational Telecommunications Commission members; Defendants Campbell and McAdams' terms as Commissioners

expired prior to August 17, 1992, and they were no longer Commissioners.

6. AETN defendants admit that William Clinton was Governor of the State of Arkansas and appointed members to Arkansas Educational Telecommunications Commission during his terms as Governor.

7. AETN defendants admit that AETN and the Associated Press proposed to broadcast a television show featuring a debate on or about October 22, 1992, between the two major party candidates in the 1992 general election for the Third Congressional District.

8. AETN defendants admit that plaintiff was not scheduled to participate in said broadcast.

9. AETN defendants admit that by letter dated August 24, 1992, plaintiff requested that he be included in said broadcast.

10. AETN defendants admit that by letter dated September 4, 1992, defendant responded to plaintiff's letter regarding said debate. Defendant Howarth notified plaintiff that said debate was exempt from the equal opportunity requirements under 47 U.S.C. § 315 and that AETN had determined in its bona fide journalistic judgment to limit said debate to the elected nominees of the two major parties. Plaintiff was advised of his administrative remedy with the Federal Communications Commission and was given the appropriate telephone number for the Commission. A copy of said letter is attached hereto as Exhibit A and is incorporated by reference herein.

11. AETN defendants affirmatively plead that plaintiff was not scheduled to participate in said broadcast because in the journalistic judgment of the AETN staff, plaintiff was not perceived as a viable candidate and limiting the broadcast to the two major party candidates would provide to viewers the maximum amount of information about the two candidates most

likely to be elected in the allocated time period in a debate format; said programming decision was not the result of plaintiff's view points.

12. AETN defendants each sufficient information or belief regarding plaintiff's alleged contact with the F.C.C. as to AETN's decision to limit the broadcast program to the two major party candidates; defendants therefore deny each and every material allegation regarding plaintiff's alleged contact, communications and other dealings with the F.C.C.

14. AETN defendants generally and specifically deny each and every material allegation set forth in plaintiff's pleadings not expressly admitted herein.

15. AETN defendants affirmatively plead that plaintiff failed to exhaust his administrative remedy before the F.C.C.

16. AETN defendants affirmatively plead that Defendant Clinton is protected by absolute immunity as President of the United States.

17. AETN defendants affirmatively plead that should the court determine the individual defendants herein are sued in their individual capacities, defendants are entitled to qualified immunity because of their reasonable reliance upon existing law and judicial and administrative interpretations thereof.

18. AETN defendants affirmatively plead that the planning for and broadcast of said debate was by staff and that neither the Foundation Board or its members nor the AETN Commission or its members participated in same.

19. AETN defendants affirmatively plead that the F.C.C. has exclusive jurisdiction over plaintiff's complaint regarding not being included in said debate.

20. AETN defendants affirmatively plead that plaintiff lacked standing to litigate issues on behalf of voters in the Third Congressional District or on behalf of any other person.

21. AETN defendants affirmatively plead that plaintiff has failed to state any claim upon which relief can be granted against any defendant.

22. AETN defendants affirmatively plead that the court lacks jurisdiction over the subject matter of this action and the persons of the AETN defendants.

23. AETN defendants affirmatively plead that they are immune from suit for damages pursuant to the Eleventh Amendment to the United States Constitution.

24. AETN defendants affirmatively plead they are not persons pursuant to 42 U.S.C. § 1983.

25. AETN defendants affirmatively plead that they are immune from suit and liability under state law pursuant to Art. 5, § 20 of the Arkansas Constitution and A.C.A. § 19-10-305.

26. AETN defendants affirmatively plead that plaintiff's claim to appear on the 1992 debate is moot.

27. AETN defendants generally and specifically deny the existence of any John Does or special interests that control the politicians and exert illegal influence on AETN.

28. AETN defendants are contemporaneously serving and filing herewith a motion to stay proceedings herein pending a determination by the Supreme Court whether to grant certiorari on a petition to be prepared and filed by appellees in No. 93-1031 WA, Eighth Circuit Court of Appeals.

WHEREFORE, AETN defendants pray that plaintiff's complaint and other pleadings herein be dismissed, for its costs and all other proper relief.

Respectfully submitted,

WINSTON BRYANT
Attorney General

By: /s/ Thomas S. Gay
THOMAS S. GAY, #77053
Senior Assistant
Attorney General
323 Center St., Suite 200
Little Rock, AR 72201-2610
(501) 682-2007

Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Thomas S. Gay, Senior Assistant Attorney General, do hereby certify that I have served the foregoing by mailing two copies of same, U.S. Mail, postage prepaid to Ralph P. Forbes, Box 88, London, AR 72847, on this 11th day of July 1994.

/s/ Thomas S. Gay
THOMAS S. GAY

573ncc

Exhibit A

September 4, 1992

Ralph P. Forbes
Box 88
London, AR 72847

Dear Mr. Forbes:

This is written in response to your letter of August 24 regarding the congressional debate produced, jointly, by AETN and the Associated Press.

Under 47 USC 315, as interpreted by the Federal Communications Commission and the Courts, debates are exempt from the equal opportunity requirement.

AETN has made a bona fide journalistic judgement that our viewers would best be served by limiting the debate to elected nominees of the two major parties.

Your letter indicates an interest in an administrative appeal of an adverse decision. You should feel free to contact the Fairness/Political Programming Branch of the Enforcement Division, Federal Communications Commission, Area Code 202-632-7586.

Sincerely,

/s/ Susan Howarth

SUSAN HOWARTH
Executive Director

PS: Mail intended for AETN management should be addressed to P.O. Box 1250, Conway, AR 72032, P.O. Box 100 is a bank dropbox and mail so addressed reaches us one to three days after arrival in the Conway Post Office.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph Forbes	*
	*
Plaintiff	*
	*
v.	*
	*
The Arrogant Orwellian	*
Bureaucrats of the Arkansas	*
Educational Television	*
Commission Network	*
Foundation and its Board of	*
Directors in their Official	*
Capacities; The Arkansas	*
Educational	*
Telecommunications and Its'	*
Members and Officers;	*
Susan J. Howarth, in her	*
official capacity as Executive	*
Director; Victor Fleming,	*
in his official capacity as	*
Chairman; G.E. Campbell,	*
in his official capacity as	*
Vice Chairman; Dr. Caroline	*
Whitson, in her official	*
capacity as Secretary;	*
Commissioner Diane Blair,	*
in her official capacity;	*

Commissioner S. McAdams, in his official capacity; Commissioner James Ross, in his official capacity; Commissioner Jerry McIntosh, in his official capacity; Commissioner Lillian Springer, in her official capacity; Amy L. Oliver, in her official capacity as Production Manager, William Clinton, in his official capacity as Governor of the State of Arkansas; and certain "John Doe" Crooked, Lying Politicians and Political "Dirty Tricks" Operatives; the Special Interests That Control the Politicians and Exert Illegal Influence on AETN

Defendants

Filed: May 5, 1995

DEFENDANTS' MOTION TO DISMISS CERTAIN DEFENDANTS

Defendants Arkansas Educational Television Commission, Arkansas Educational Telecommunications Network Foundation, Susan J. Howarth, Victor Fleming, G.E. Campbell, Dr. Caroline Whitson, Diane Blair, S. McAdams, James Ross, Jerry McIntosh, Lillian Springer, Any L. Oliver, and William Clinton (AETN Defendants"), by their counsel, respectfully move this Court for an Order dismissing G.E. Campbell and S. McAdams from this case. A memorandum in support of this motion is attached.

Respectfully submitted,

/s/ Richard D. Marks
Richard D. Marks
Admitted *pro hac vice*
Karen A. Post
Admitted *pro hac vice*
DOW, LOHNES & ALBERTSON
1255 Twenty-third Street
Suite 500
Washington, D.C. 20037
(202) 857-2565

-and-

Thomas S. Gay
Arkansas Bar No. 77053
Senior Assistant
Attorney General's Office
323 Center Street
Suite 200
Little Rock, AR 72201-2610
(501) 682-2007

Attorneys for the AETN
Defendants

Dated: May 4, 1995

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph Forbes	*
	*
Plaintiff	*
	*
v.	*
	*
The Arrogant Orwellian	*
Bureaucrats of the Arkansas	*
Educational Television	*
Commission Network	*
Foundation and its Board of	*
Directors in their Official	*
Capacities; The Arkansas	*
Educational	*
Telecommunications and Its	*
Members and Officers;	*
Susan J. Howarth, in her	*
official capacity as Executive	*
Director; Victor Fleming,	*
in his official capacity as	*
Chairman; G.E. Campbell,	*
in his official capacity as	*
Vice Chairman; Dr. Caroline	*
Whitson, in her official	*
capacity as Secretary;	*
Commissioner Diane Blair,	*
in her official capacity;	*

Commissioner S. McAdams, in his official capacity; Commissioner James Ross, in his official capacity; Commissioner Jerry McIntosh, in his official capacity; Commissioner Lillian Springer, in her official capacity; Amy L. Oliver, in her official capacity as Production Manager, William Clinton, in his official capacity as Governor of the State of Arkansas; and certain "John Doe" Crooked, Lying Politicians and Political "Dirty Tricks" Operatives; the Special Interests That Control the Politicians and Exert Illegal Influence on AETN

Defendants

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS CERTAIN DEFENDANTS

Defendants Arkansas Educational Television Commission, Arkansas Educational Telecommunications Network Foundation, Susan J. Howarth, Victor Fleming, G.E. Campbell, Dr. Caroline Whitson, Diane Blair, S. McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L. Oliver, and William Clinton ("AETN Defendants"), by their counsel, respectfully submit this memorandum in support of their motion to dismiss certain defendants.

This case arises from the decision of the Arkansas Educational Television Network ("AETN") not to extend an invitation to the plaintiff, Ralph P. Forbes, to a televised debate in October 1992. The plaintiff named as defendants, among others, all those who he believed were then members of the Arkansas Educational Television Commission ("AETC"). However, the plaintiff erred. Both defendants G.E. Campbell and S. McAdams were not members of AETC at the time the events at issue in this case took place. The attached certified copies of the Governor's Official Appointments demonstrate (a) that on April 10, 1992, Lavenia Craig was appointed to AETC, replacing George E. Campbell, and (b) that on May 14, 1992, Robert Doubleday was appointed to AETC, replacing Sheila McAdams. See Exhibits 1 & 2. Thus, neither G.E. Campbell nor S. McAdams was a commissioner in October 1992. Accordingly, this Court should dismiss both G.E. Campbell and S. McAdams from this case.1/

1/ The AETN Defendants are not opposed to the Court's substituting Ms. Craig and Mr. Doubleday for Mr. Campbell and Ms. McAdams, if it deems substitution to be proper.

Respectfully submitted,

/s/ Richard D. Marks
Richard D. Marks
Admitted *pro hac vice*
Karen A. Post
Admitted *pro hac vice*
DOW, LOHNES & ALBERTSON
1255 Twenty-third Street
Suite 500
Washington, D.C. 20037
(202) 857-2565

-and-

Thomas S. Gay
Arkansas Bar No. 77053
Senior Assistant
Attorney General's Office
323 Center Street
Suite 200
Little Rock, AR 72201-2610
(501) 682-2007

Attorneys for the AETN
Defendants

Dated: May 4, 1995

Exhibit No. 1

79

GOVERNOR'S OFFICE
OFFICIAL APPOINTMENTS
STATE BOARDS, COMMISSIONS, AND DEPARTMENT HEADS

Little Rock, Ark., April 10, 1992

TO THE SECRETARY OF STATE:

Under the provisions of Act _____ of 19____
I have, as of this date, appointed Lavenia "Vennie" Craig whose address is 600 East Ninth El Dorado Union as a member of the
(Street) (City) (County)
Ark. Educational Television Network Commission
(Board, Commission or Department)
for the term which expires on March 23, 2000. Replaces George E. Campbell
$ ——— attached herewith to pay required fee.

Date Qualified _____

Folio No. _____ /s/ Bill Clinton
(Governor)

By /s/ Patsy Gatlin
(Secretary)

Form G-2

CERTIFICATION

I, Sharon Priest, Secretary of State, State of Arkansas Certify that this document is a true and accurate copy of the appointment on file in this office.

/s/ Sharon Priest
Sharon Priest
Secretary of State

Exhibit 2

79

GOVERNOR'S OFFICE
OFFICIAL APPOINTMENTS
STATE BOARDS, COMMISSIONS, AND DEPARTMENT HEADS

Little Rock, Ark., May 14, 1992

TO THE SECRETARY OF STATE:

Under the provisions of ~~Act~~ ACA 17-93-301 ~~of 19~~____ I have, ~~as of~~ on this date, appointed Robert Doubleday whose address is 1912 Beachwood St. Little Rock Pulaski
(Street) (City) (County)
as a member of the
Ark. Educational Television Network Commission
(Board, Commission or Department)
for the term which expires on March 27, 1997. Replaces Sheila McAdams
$ _____ attached herewith to pay required fee.

Date Qualified _____

Folio No. _____

/s/ [illegible]
(Governor)

By /s/ [illegible]

(Secretary)

CERTIFICATION

I, Sharon Priest, Secretary of State, State of Arkansas Certify that this document is a true and accurate copy of the appointment on file in this office.

Date:_____

/s/ Sharon Priest
Sharon Priest
Secretary of State
State of Arkansas

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing DEFENDANTS' MOTION TO DISMISS CERTAIN DEFENDANTS and MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS CERTAIN DEFENDANTS this 4th day of May, 1995, by first-class U.S. Mail postage prepaid, upon the following:

Ralph P. Forbes
Box 88
London, Arkansas 72847

/s/ Karen A. Post
Karen A. Post

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph Forbes	*
	*
Plaintiff	*
	*
v.	*
	*
The Arrogant Orwellian	*
Bureaucrats of the Arkansas	*
Educational Television	*
Commission Network	*
Foundation and its Board of	*
Directors in their Official	*
Capacities; The Arkansas	*
Educational	*
Telecommunications and its	*
Members and Officers;	*
Susan J. Howarth, in her	*
official capacity as Executive	*
Director; Victor Fleming,	*
in his official capacity as	*
Chairman; G.E. Campbell,	*
in his official capacity as	*
Vice Chairman; Dr. Caroline	*
Whitson, in her official	*
capacity as Secretary;	*
Commissioner Diane Blair,	*
in her official capacity;	*

Commissioner S. McAdams, in his official capacity; Commissioner James Ross, in his official capacity; Commissioner Jerry McIntosh, in his official capacity; Commissioner Lillian Springer, in her official capacity; Amy L. Oliver, in her official capacity as Production Manager, William Clinton, in his official capacity as Governor of the State of Arkansas; and certain "John Doe" Crooked, Lying Politicians and Political "Dirty Tricks" Operatives; the Special Interests That Control the Politicians and Exert Illegal Influence on AETN

Defendants

Filed: May 22, 1995

PROPOSED JURY INSTRUCTIONS

Defendants Arkansas Educational Television Commission, Arkansas Educational Telecommunications Network Foundation, Susan J. Howarth, Victor Fleming, G.E. Campbell, Dr. Caroline Whitson, Diane Blair, Sheila McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L. Oliver, and William Clinton ("AETN Defendants"), by their counsel, submit the following Proposed Jury Instructions:

(1) If you find that AETC's decision not to invite Forbes to participate in the televised debate was not influenced in any way by political or administrative pressure from the State of Arkansas, you must find for the defendants.

(2) If you find that AETC's decision not to invite Forbes to participate in the televised debate was influenced in any way by political or administrative pressure from the State of Arkansas, then must you consider whether Ms. Howarth or any member of her professional staff considered Forbes' views in deciding not to invite Forbes to participate in the televised debate. If you find that Ms. Howarth and her professional staff did not consider Forbes' views in deciding not to invite Forbes to participate in the televised debate, you must find for the defendants. If you find that Ms. Howarth or any member of her professional staff did consider Forbes' views in deciding not to invite Forbes to participate in the televised debate, you must find for the plaintiffs.

Respectfully submitted,

/s/ Karen A. Post
Richard D. Marks
Admitted pro hac vice
Karen A. Post
Admitted pro hac vice
DOW, LOHNES & ALBERTSON
1255 Twenty-third Street
Suite 500
Washington, D.C. 20037
(202) 857-2565

-and-

Thomas S. Gay
Arkansas Bar No. 77053
Senior Assistant
Attorney General's Office
323 Center Street
Suite 200
Little Rock, AR 72201-2610
(501) 682-2007

Attorneys for the AETN
Defendants

Dated: May 19,1995

CERTIFICATE OF SERVICE

I hereby certify that I have served the AETN Defendants' Proposed Jury Instructions this 19th day of May, 1995, by first-class mail, postage prepaid, upon:

Ralph P. Forbes
Box 88
London, Arkansas 72847

/s/ Karen A. Post
Karen A. Post

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph Forbes *
*
Plaintiff *
*
v. *
*
The Arrogant Orwellian *
Bureaucrats, et al. *
*
Defendants *

Filed: May 23, 1995

ORDER

On this 22nd day of May, 1995, came on for consideration the defendants' motion to amend the caption and the defendants' motion to dismiss certain defendants.

The defendants request that the caption be amended to delete slanderous and prejudicial language. Defendants also request that the caption be altered to reflect the correct names of the corporate entities the plaintiff has sued. In connection with their motion to amend the caption, defendants also filed a motion to dismiss two

defendants, G.E. Campbell and S. McAdams. Both were former commissioners who were not serving as commissioners at the time the decision in question was made. Instead, G.E. Campbell and S. McAdams had been replaced by Lavenia Craig and Robert Doubleday.

Plaintiff has responded to the motions indicating he does not object to the amendment of the caption or to the dismissal of G.E. Campbell and S. McAdams. Accordingly, the motion to dismiss G.E. Campbell and S. McAdams is granted. The court will substitute as defendants the successors of the two commissioners who were improperly named. The motion to amend the caption is also granted. The caption should heretofore be as follows:

Ralph Forbes	*	
	*	
Plaintiff	*	Civil No. 92-2190
	*	
v.	*	
	*	
The Arkansas Educational	*	
Television Commission, The	*	
Arkansas Educational	*	
Telecommunications Network	*	
Foundation, Susan J.	*	
Howarth, in her official	*	
capacity, Amy Oliver, in her	*	
official capacity, Victor	*	
Fleming, in his official	*	
capacity, Dr. Caroline	*	
Whitson, in her official	*	
capacity, Diane Blair, in her	*	
official capacity, James Ross,	*	
in his official capacity, Jerry	*	
McIntosh, in his official	*	
capacity, Lillian Springer, in	*	
her official capacity, Lavenia	*	
Craig, in her official	*	
capacity, Robert Doubleday,	*	
in his official capacity, and	*	
William Clinton, in his official	*	
capacity	*	

Defendants

In his response, plaintiff requests that the court substitute in the place of the previously named "John Doe" defendants, the following individuals as employees of AETN: (1) Oscar Eugene Goss, Arkansas Educational Television Network; (2) Steve Barnes, KARK TV, 4 Eye-Witness News and AETN Producer; (3) Bill Simmons, Associated Press, Chief of Bureau/Arkansas; (4) Carol

Adornetto; and (5) Larry Foley. The court is further asked to shorten the time for discovery with respect to these and all other persons. Plaintiff further states that upon discovery he may find out the names of other persons who should be named as defendants. He therefore asks that the caption retain the "John Doe" or unnamed defendants. These requests are denied. This matter is set for trial the week of June 5, 1995, two weeks from today. The court's scheduling order provides that no discovery shall occur, except upon agreement by the parties, within thirty days prior to the scheduled trial date. The court cannot allow the plaintiff to name new defendants at this stage of the case; nor can the court allow the plaintiff to begin wholesale discovery when he should be preparing for trial or responding to the various motions pending in the case.

Finally, plaintiff has submitted a number of petitions filed on behalf of individuals seeking to join as plaintiffs in this case. The petitions to join as plaintiffs and members of an injured class are denied as untimely.

IT IS SO ORDERED.

/s/ H. Franklin Waters
United States District Judge

HFW/sg

Direct Examination of Ralph P. Forbes

[116] Let me testify as to the news media's interest in my candidacy. In November of 1991, I received confidential information that Congressman John Paul Hammerschmidt was not going to run for reelection, and it was suggested that I seek his -- seek that seat that he would be vacating. I then put out -- I then talked about it and thought about whether I should run or not, and in the course of that investigation on my part, I received a telephone call from Sid Tobinon who was the reporter for the *Arkansas Democrat* in the Fayetteville area at that time.

And I told her that because of past experiences I felt that the media would try to ruin any campaign I would try to undertake at that time, and I asked her to not publish anything and that if I decided to run I would give her an exclusive and I would tell her about it first. She agreed to that, and then at a later time, approximately March of that year, a number of people in the media including, I believe, the Associated Press, and in particular I remember the Eye on America for CBS, a national television organization, flew into Arkansas, and I told them I really didn't want any publicity. They said they thought my candidacy was important, and they wanted to do a news story on it, and they did. It was broadcast I believe in March or April of 1992, about at the time I started the petition drive.

When I started the petition drive, there were all [117] kinds of headlines with my name on it saying I was trying to run. The stories were not – I didn't think they were intended to be helpful; nevertheless our experience was that – my personal experience is that nine out of ten people that I ask in all 16 counties in the Third District, all of them signed.

Many of them signed because they wanted me to be elected. Others signed because they thought at least they wanted an alternative, but nine out of ten – this is my testimony, and it would be the testimony of anyone else that helped me on the drive that about nine out of ten people that we asked who were qualified voters in this Third District signed their petitions.

Well, I met the deadline. I turned in a sufficient number of signatures. I believe it was the end of April if I recall correctly.

At that time I was told that -- or about that time I was told by Mr. Fincher, Secretary of State's Office, that unless all of my signatures from petitioners on the same sheet were by voters from the same county, they couldn't be counted, and this caused me to go on another petition drive in a certain short period of time, but by that time we knew how to really go out and get them, but it's still difficult, even under the best conditions, 20 signatures an hour is very good.

It's just -- there's no way that -- maybe 30 an hour [118] rarely, but that's about the maximum anyone could do.

So it takes 10, 12 hours a day to get even a few hundred signatures, and went on the second drive and during the course of that time, in Benton County, for example, a police officer threatened to arrest me if I continued to collect signatures in Benton County. There was a lot of obstacles. It was not an easy task for me or anyone else. When we got on the ballot, even before I got on the ballot there were a lot of people that were aware -- I was collecting signatures and doing very well.

There were probably about ten people that -- the news media would call me up and ask me if I'd heard of so-and-so, and I'd say, no. "Well, he's running for Congress also. He's trying to collect signatures." Well, to the best of my knowledge, none of those people got enough signatures. I was the only one who succeeded in doing that.

The -- one of the people that was interested in my candidacy was Mr. Beretson who is the newscaster from Fort Smith, Channel 5. He called me up and asked me, he felt that because they had other candidates on that they were obligated morally and probably by law to interview me and asked me if I would consent to an interview, and I said I'd be glad to.

I appeared on their station, I believe it was May 15th of 1992. They told me that they received a large number of favorable telephone calls in regard and comments from my [119] appearance at that time.

On July 8th, I received a letter from Mr. Bill Simmons who is the State Director of the Arkansas Associated Press Bureau, and Mr. Simmons asked me as a candidate to answer 230 questions that they were in a form, which I then proceeded to do.

* * *

[123] MR. FORBES: After I wrote my letter to Ms. Howarth, I received a letter from her saying that they had decided that they would not include me in the debate. I then made a telephone call to Washington, D.C. and I called the FCC, the Federal Communications Commission, and I told them what my grievance was, and then I requested an administrative procedure to start so that I could be allowed in the debate, and the person that I -- who answered the phone, who I believe, from knowing his voice was Mr. Gross, but he did not tell me his name.

The person that told me about the procedure, he said the procedures -- first of all, he told me not to bother. He said that it would be a waste of my time and a waste of everyone else's time, and that if I put in the grievance that by the time I went through their staff procedures and went [124] through several layers of different lawyers that would look at it, they would -- I would get a denial, but the denial would come after the debate and after the election so I'd just be wasting my time. They asked me not to do it, and I said, "Well, I believe I have a right."

So I wrote him a letter -- I may not have a copy of it but the letter, I asked him to just give me the denial to begin with so that I could then appeal and come into the courts and ask the courts for equal time. I never received anything and eventually it got down -- the debate was going to be on October 22nd, I believe, and eventually I felt I had no other recourse at law other than to file a lawsuit and a request for injunctive relief.

* * *

[127] MR. FORBES: Thank you, Your Honor.

Attending that hearing was Mr. Tom Gay of the Attorney General's Office, Senior Assistant, and representing AETN was Mr. Gene Goss, who I believe is the assistant executive director.

After the hearing and it appeared that I would not have a court order to be in the debate, I put in a immediate notice of appeal. I'm not saying that for procedure. Just so we understand why the remark was made.

Mr. Goss then asked I believe it was Mr. Gay is it possible in less than 24 hours that Mr. Forbes could get a court order from a three-judge panel and be allowed in the debate, and I believe the answer was something like well, sure, anything is possible, and then Mr. Goss seemed to not be very happy about that, and he said that if there was a court order where I had to be in the debate they would cancel the debate and would run re-runs of "St. Elsewhere" rather than broadcast a debate in which I had to be included.

After that, a reporter who I think was Joan Duffy but I'm not sure. There were a number of people there -- asked, "Did I hear you right? Did you say you would cancel the debate and run St. Elsewhere instead?"

And he said, "Yes, that's exactly right," and he was quite determined that this was so.

I felt that there was some hostility to including me [128] on the debate was my interpretation of it. The next day I went to Conway, which is the headquarters of AETN, and I went to the studio because I felt that I needed to reaffirm my right, number one, my claim to my right which I believed to be included in the debate and, secondly, I needed to again make my claim that if they won't include me in the debate I would be willing to accept what I called separate but second-class equal and they would afford me equal access or equal time and I would have my own time, separate from the other candidates. I'd be willing not because it was my first choice, but because it was my only choice, and when I arrived at the studio there was -- much to my pleasant surprise, there were a number of UCA students who were picketing and protesting and demanded that there be free speech, and they were against censorship, and I was very pleased to see that.

I went into the lobby of the studio. There were a lot of people in the media there. The -- they immediately started interviewing me. Mr. Goss came up to them and said, "This is not the purpose to give this guy publicity. We --" you know, "we have a debate going on in here. That's the news. That's what you guys should report on."

A number of these reporters made remarks to me that they were bored and sick of the debate. They were tired of covering

them. It was just a horrible part of their job, and even if they didn't like me or didn't like my views, they [129] welcomed the fact that I was a diversion, that I was some kind of not boring, gave them something interesting to do while the debate was going on, so most of the -- a large number of the press stayed out in the lobby and kept interviewing me, and Mr. Goss kept disrupting them, and in the course of that debate period I kept making my claim that I should be in the debate. I said, "Look, already time is being used up, but I feel I have a right to be included."

Then I said, you know, "If not I'm going to have to continue with the lawsuit and I have to also continue making my claim to have equal access, that even if you don't put me on the debate you have to include me sometime between now and the election and give me equal facilities," and he said, "I don't give a blankety, blank, blank what you do, and that was sort of the course of the conversation. I believe that one of the moderators at that debate was Craig Cannon who is an affiliate of the ABC stations here in Fort Smith and Fayetteville.

After it was over, okay, someone came out that was in the studio. I wasn't allowed in the studio. Someone came out from the studio and they said, "Well, Mr. Goss, I'm so glad you didn't allow Mr. Forbes in there. He would have won the debate and he would have hurt everything," and then Mr. Goss said I had to leave the area, leave the building, and I asked why. He said, "Well, you just can't be here. They're coming [130] out now."

* * *

[132] MR. MARKS: No, Your Honor.

THE COURT: Received.

(Plaintiff's Exhibit No. 13 identified and received.)

MR. FORBES: That's fine. I think he wants to put a sticker on one of these, yeah.

Earlier I mentioned my conversation with Mr. Craig Cannon. On October 15th, 1992, I was in Fayetteville, and the station he worked for, there were commercial stations. They're different from AETN which is a state agency. They had also had a debate including the Republican and the Democratic candidates for that

office, and I found out about it the day of the debate. I was not invited, and I went to the station and I asked if I could buy time around the debate and I was told I couldn't, but I was told by Mr. Pitcock, "If you come to the debate, I think I can let you in because I think it's right that you be afforded equal opportunity."

So I went to the debate. I sat quietly in the audience while I was actually attacked by both of my opponents. I -- Carolyn Long was in there. I gave Ms. Long a question and a statement saying "I'm here and I would like to be invited and have an opportunity to respond to some of these attacks and things," and the question was not passed but after the debate Mr. Cannon came up to me and he interviewed me and again he apologized because he felt that I should have been included in the debate and he had nothing to do with that [133] decision, and another reporter from a local paper, the *Washington County Observer* of October 22nd, 1992, was interviewing me after that debate, and there was a young man who worked there and he was just getting off work, and the reporter asked him, "Did you see the debate?" and he said, "Yes, I did. It was very boring."

And he said, "What do you think about the fact that they wouldn't let the other -- the independent on?" He said, well, he thought that was terrible, and by chance, this was a young black man. He said, "Well, what do you think that this guy, his opponent's called him a hater of other races and so on. Why -- do you still think he had a right?"

"Yes, he still had a right." He said, "You know this guy even talking to?" Said, "Yes." Said, "He's the guy." He said, "Oh, you're kidding me" and so we started talking again and introduced ourselves. We talked for about an hour. This story is based upon that.

The man was an 18-year old. He decided to vote because of the fact that I was excluded from the debate and he decided that he's going to be involved in the political system because he thought it was so unfair the way I was treated, and he -- one of the purposes of the debate by AETN was to enlist 18 year olds, so, Your Honor, at this time I would like to enter copies of that newspaper ad from the *Washington County Observer* of October 22nd.

* * *

[140] MR. MARKS: -- will be exceptionally confusing to the jury but in fact I can't tell what it is.

MR. FORBES: Some of them, I'll admit are --

THE COURT: I tell you what let's do. Let's let me look at them while we go on.

MR. FORBES: That's what it is, and there's more than one page basically, a different document.

MR. MARKS: It's -- is there lots of petitions --

THE COURT: Let me look at them while you go ahead and -- you go ahead and finish. And if the Court determines that they are admissible, we'll go back and let you put these in, okay? All right.

(End of bench conference.)

THE COURT: You may continue, Mr. Forbes.

MR. FORBES: I think the only -- excuse me -- I think the only thing that I need to testify to is a factual issue, is that I want to make it clear that at all times I claimed all of my rights including my right to the equal access after the reasonable equal access after the debate was over and before the election. And that would be all I think is relevant right now.

Cross Examination of Ralph P. Forbes

[144] BY MR. MARKS:

Q. I asked you, question, "Did you win or lose?" and what was your answer?

A. "Well, I believe I won, but the official thing was I lost. I'm saying the first tally was I won by two-thirds of the vote cast. By the next time they counted it I didn't have hardly any votes."

Q. All right. Thank you.

Now in 1986, you ran for the -- you ran in the Republican primary --

A. Yes, sir.

Q. -- for Lieutenant Governor?

A. That's correct.

Q. Is that correct? And you lost that election. Is that correct?

A. Well, that again was a debatable question. Officially I lost, yes, sir.

Q. All right. And I'd like to now go to 1990, which was two years before the 1992 election.

A. That's right.

[145] MR. FORBES: Yes.

MR. MARKS: I just want to -- let me -- because I think you're wandering far afield of the question.

BY MR. MARKS:

Q. Did you win or lose the 1990 Republican primary for Lieutenant Governor?

A. I believe I won because on May 29th in a three-way race, I had 53 percent of the vote.

Q. But what was the actual result?

A. After some Pulaski County reconfiguration of the figures it got down to I think 48 or 49. I forget the number, now, but it was under 50 percent, which caused a -- resulted in a runoff I believe on June 12th.

* * *

[146] Q. So you lost in that election?

A. Oh, yeah. But it wasn't an election.

Q. All right. But at least in terms of the State of Arkansas, it was --

A. In terms of the official papers, no, I did not win, and I filed the lawsuit.

Q. But, Mr. Forbes, please stay with me or we'll be here all afternoon.

A. Okay. I'm sorry. I'm sorry.

Q. And we may be all be here all afternoon in any event.

A. None of us want to do that.

Q. But the point is that you ran for the Republican primary in 1990 for Lieutenant Governor.

A. That's correct.

Q. And the official result was that you lost?

A. Oh, sure.

Q. All right. Now, Mr. Forbes, we heard from a number of the members of your family today and, of course, from you about your petition drive and about your campaign, and so now I'd like to go into the campaign. This is the part of the -- of your election where you -- you have filed your signatures and you'd already been certified as a candidate. All right.

Now, Mr. Forbes, it's true, is it not, that your campaign was very disorganized and, in fact, you yourself described it [147] as bedlam?

A. I think that would be a very accurate description.

Q. And it's also true, as I think we saw today that your wife and some of your children helped in your campaign, did they not?

A. That's correct.

Q. But really other than that, you had very few volunteers and it was a one or two main -- one or two man campaign toward the end of your campaign; isn't that correct?

A. It isn't because of the nature of the way -- yes. Yeah.

Q. A one or two man campaign. Now, Mr. Forbes, in campaigns, people have campaign headquarters, and in your campaign, your headquarters either was your home or wherever you happened to be at a particular time.

A. Some friends and supporters in Fort Smith or Fayetteville or Huntsville or Mena or wherever. That's right.

Q. Wherever you were was the headquarters?

A. That's exactly correct.

Q. You didn't have an official storefront or campaign building as a headquarters?

A. No, absolutely not.

Q. And, you know, we all know that for better or for worse, raising money is a -- is a big part of an election.

A. I think for worse, but that is true.

Q. Well, many of us might agree with you, but in any event [148] you did try to raise money, did you not?

A. Yes, I did, and I raised some.

Q. And you actually raised just under $10,000?

A. I think that's correct. It wasn't very much by politician standards. That's for sure.

Q. Now, Mr. Forbes, one of the things that happened as a result of not being able to raise much money was that you weren't able to buy nearly enough radio ads, were you?

A. In my opinion, no, obviously, and obviously by the results.

Q. And you really weren't able to buy television advertising, were you, because that's real expensive?

A. I bought some.

Q. But not nearly enough?

A. Not as much as I wanted to, no.

Q. And not really enough, right?

A. I would say by the books I've read, if you're buying television advertisement, you would have had to have spent more money than I had.

Q. And -- now you were trying very hard at this time and you're really putting your heart and soul into this campaign, weren't you?

A. Because I wanted to express my views, yes, that's correct.

Q. But I think you knew that you weren't getting nearly enough coverage from the media, from television, from radio in [149] order to attract attention; isn't that correct?

A. It's correct that after I became a certified candidate the media, which is the right of the public's media -- I'm not questioning that -- decided that the best way to handle it would be to black out everything I said or did.

Q. Well, for whatever reason --

A. Whatever reason.

Q. -- you didn't get coverage, and I think in a moment that we had, you described yourself as not even a flea scratching an elephant. Is that correct?

A. I would say that as long as the media -- in other words, the media is the key to winning elections now. I think we discussed how -- I was told that had stumping still been a viable

campaigning method, I probably would have won any election I was entered into, but because of the nature of things and America and Arkansas today the only practical means of winning any election is some sort of mass communication.

Q. And I don't want to make too much of a point of this, but I do want you to turn to page 14 of that deposition, just the next page, and if you'll look at line -- read line 6 through 8 because I really want an answer to my question here. Go ahead and read that.

A. You start at 5. Is that correct?

Q. On page -- excuse me. I'm the wrong. I'm at the wrong page. Turn to page 49. My mistake. I'm looking at too many [150] numbers here. Let me do this for you.

Page 49, start at 6, line 6. Let's see.

A. "And by that standard, whatever those standards were which I was looking up in some books at that time, I wasn't even a flea scratching an elephant."

Q. So what you were really worried about was that you simply weren't getting enough coverage from any of these media here in the Third District to win this election, correct?

A. It's absolutely correct. You have to have coverage. If you convince ten people and they're absolutely for you, it doesn't -- ten people aren't a lot in, you know, hundreds of thousands of people.

Q. Now when you were doing this campaign you really spent a lot of time on these activities where you were trying to be a successful candidate, and I mean I want you to explain, you know, there are folks I want you to talk to. But it's true, is it not, that you were told by many people that there was a general consensus that your campaign just didn't exist, wasn't getting anywhere?

A. There were even a number of people who volunteered and helped me on the petition drive that weren't even aware that I had become a certified candidate.

Q. It was that bad?

A. The censorship of me and my candidacy was that bad.

Q. And this was -- we're not talking now about censorship by [151] AETN. We're talking about -- we're not talking about

AETN's decision. We're not talking about AETN's programming. We're talking about all the newspapers –

A. That's right.

Q. – and all of the radio stations and all of the television stations here in this district, and they just were not covering you, is that correct?

A. It seemed that once I had done the newsworthy thing of making history and achieved balance status, and was a qualified legal candidate, all of the people that were free to – and I'm not questioning that. I'm saying that they have – the *Arkansas Democrat-Gazette* has the right to say anything they want about me.

Under *Sullivan* they can lie about me. I can't do a thing about it. They can do whatever they want, publish or not published. There's no question about that. The only alternative I had was AETN who was a state agency under constraints that I had to have equal time. This was the only option I had as a candidate, not backed by PACs, not backed by special interests of reaching any significant number of people.

Q. In other words, none of the other media were covering you so your only hope really in order to come up to the level of Mr. Hutchinson and Mr. Van Winkle was somehow to get on AETN?

A. I would think the practical realities of that situation [152] that was it because all other avenues of expressing my views had been barred.

Q. Now I want to go back to this comment about what people in the Third District told you because I think it's really important for the jury to hear what the people in the Third District were saying to you and the folks you spoke to really said that your campaign didn't exist and that what you were doing was not newsworthy. Didn't they say that to you?

A. Oh, no, I don't think so. If I understand what you're saying I don't think anyone told me what I was doing was not newsworthy.

A. All right. Let me ask you to turn to page 52, and I'd asked you about your efforts and whether they were successful to get on newspapers, and if you start reading at line 11 and read

through line 21, I think I'd like the jury to hear this one little session because this is your answer when you testified earlier in this case from – in your own words. So, Mr. Forbes, please start at page 52, line 11 and just read, I asked you why you didn't think in your opinion you were successful getting press coverage, and here's your answer –

A. Let me ask. Does the jury get the entire thing? Do they see everything in context?

THE COURT: You answer the questions now and then you'll get to respond – in other words, if we had a lawyer your lawyer would get to get up and then ask you questions. [153] You may respond after he's finished but answer his questions now. Okay? And then I'll let you respond in the way you wanted to afterwards.

THE WITNESS: I think starting at Line 11,

"We were just basically – well, I was told by many people that there was a general consensus that we were non-persons. We didn't exist. Our campaign didn't exist, and it was generally agreed by everyone that no matter what I did, if I ran around in a flaming war bonnet naked, jumping off towers it would be not newsworthy, and the odd part about one thing I do recall I think it's 'AsaHi' or however they pronounce it. It's the largest Japanese news media in the country, meaning Japan, kept calling me. They wanted to come down and film my campaign. I had to keep telling them I'm sorry, that there's nothing to film."

BY MR. MARKS:

Q. Now, Mr. Forbes, many candidates, certainly Mr. Hutchinson and Mr. Van Winkle, when they ran for Congress in this district, your opponents in 1992, they had reporters covering them and traveling around with them. Did you have any reporters covering you or traveling around with you?

A. Absolutely not.

Q. And we're not talking just about AETN. We're talking [154] about any of the newspapers and the television stations and the radio stations in this district or, in fact, anywhere in Arkansas.

A. That's correct.

Q. Nobody covering you.

A. That's correct.

Q. And did any reporters ever travel with you at any time during your campaign?

A. Certainly not.

Q. And would you agree then actually to use your own words, that the press coverage of your campaign was zilch?

A. Looking back, after I made that deposition, I did find a few leaks in the paper curtain but as a practical matter, it was, I believe, orchestrated to make it appear that I -- just to make me disappear down the memory hole. That's correct.

Q. But you did describe your own -- your own campaign and the press coverage of it as zilch; is that not correct?

A. Not my campaign. I would describe what the news media did as zilch.

Q. As zilch.

Now, Mr. Forbes, there are things that one can do other than getting coverage on a television station or radio station or in a campaign. For example, you can hold rallies, but you didn't hold any rallies, did you?

A. As I told you, the -- what -- if I had any hope at all of [155] winning, I had to get on the mass media.

Q. I understand that, but please --

A. All right.

Q. -- focus on my question. The fact of the matter is that regardless of media coverage, you didn't go out and hold rallies, did you?

A. No, of course not.

Q. And, in fact, you didn't speak to any large groups. I mean, you could go to a church. You could go to a -- you could go to a rotary club. You could go to some place where there were people in large numbers, maybe speak to them and generate some news that way. But in fact you didn't speak to any large groups, did you?

A. Well, I don't know what you mean by "large," but I did speak to groups, yes.

Q. Well, I'll ask you to flip to page --

A. I remember.

Q. -- to page 55.

A. Uh-huh.

Q. And take a look at lines 5, 5 through 8, and particularly look at line 8. Would you just read line 8, please?

A. Sure.

"My recollection I don't remember any large groups."

* * *

[157] Q. And you did not come to Ms. Howarth at this time and ask her either to put you on the debate or to give you a separate program where you could appear by yourself. There's nothing in here about separate programs, is there? In this letter, Forbes Exhibit 9?

A. Well, if you look at the top of the page 2 and page 3 where you kind of table them, title, it's a request for equal access to AETN. Although at the time, I certainly thought I was entitled to be in the debate and I thought that anything [158] less would be really a violation of the 14th Amendment.

Q. Well, 14th Amendment is pretty complicated and I'm not going to try to get into that with you.

A. Well, violation of equal rights.

Q. Getting to the jury -- into that with the jury here. But it does indeed at the top of page 2 and 3 say your request for equal access to AETN.

Now when you talk about equal access, I want to go back to that second paragraph, ladies and gentlemen of the jury, on the first page, where it says, "I am respectfully requesting that I be included on equal terms with my two opponents in this debate."

A. That's correct.

Q. So I want you to focus on the question which is you wanted to appear on the same stage with these two people who were doing much better in the race than you were, correct?

A. Well, let's go back. This is August 24th.

Q. Hang on for just a second, Mr. Forbes. I want you to please, please answer my question. This letter requests that you appear on the same debate --

A. That's right.

Q. -- as these other two candidates, correct?

A. Yes, that's correct.

Q. All right. Now Ms. Howarth told you that she was not going to grant your request.

[159] A. She wrote me a letter.

Q. She wrote you a letter. And as you testified you then called a gentleman at the FCC. And it's true, is it not, that you asked this gentleman at the Federal Communications Commission in Washington, D.C. whether or not the FCC would force Ms. Howarth to let you on to this debate. They would order her from Washington to include you in the debate. That's what you wanted the Federal Communications Commission to do, correct?

A. I wanted her to obey the law. I wanted the FTC to enforce the law. That's correct.

Q. And what you wanted the Federal Government, the Federal Communications Commission to do was order her to include you in the debate, correct? It's a simple question.

A. That's what it in effect would boil down to.

Q. They would order her to -- to include you in the debate, but in fact, the gentleman at the FCC with whom you spoke said that under the law she had a right to include in the debate whomever she wanted so that they would not order her to include you in the debate with Mr. Van Winkle and Mr. Hutchinson?

A. Not under the law. Under their interpretation of policy.

Q. In any event, under their interpretation, under the Federal Communications Commission interpretation, you were not entitled to be on this debate unless you were invited, and so [160] they said over the phone to you that they would not order her to include you in the debate. Is that not what they told you?

A. I don't know about the freeze unless I was invited. They just said that they did not enforce 42 U.S.C. 315 the way it had been enforced since 1927 any longer.

Q. They refused to order that you be included in the debate. Is that correct?

A. That's correct. Well, excuse me. They told me they would refuse. They did -- really took no action.

Q. Because you didn't ask them to take action?

A. I did ask them to take action, yes, sir.

Q. And then they said that if you wanted them to really take action you should put it in writing, correct?

A. They claimed they sent me some forms. By the time -- well, I'm saying --

Q. I'm just asking about what they said over the phone.

A. Oh, on the phone.

Q. Yeah. They said if you wanted to make a complaint to put it in writing?

A. Possibly. I think so. I think that's correct. I don't remember but it must have been.

Q. Now when you called this fellow at the FCC and he told you that he wasn't going to force Ms. Howarth to let you on this debate, did you then say to him, "Well, I want you to force her to give me a separate program all by myself if I can't get [161] on the debate"? You didn't say that to Mr. Gross, did you?

A. I'm not sure, but I thought, you know, that was an alternative, and we hadn't crossed that bridge yet, so I don't know whether --

Q. So you did not ask Mr. Gross at the FCC to order Ms. Howarth to give you some separate time, did you?

A. Not in any way that would waive my claim to the equal.

Q. In fact, you didn't ask at all, did you, for that -- for the separate --

A. I don't remember exactly what I said, but that would have only been a secondary option, after that October 22nd date.

Q. And that was because your focus was on the debate?

A. Absolutely. I had a right to be there --

Q. You thought you had a right to be there --

A. I know I had a right.

Q. -- and your focus was on the debate, correct?

A. I knew then and I believe I have now.

Q. Okay. So I just want to get an answer because we've gone around this mulberry bush a couple of times, but I want to be sure the jury understands, you do not recall asking Mr. Gross if you could get a separate program because you wanted to be on the debate, so you do not recall asking Mr. Gross to give you a separate program?

A. Not at that time because my claim was for exactly what it says there.

[162] Q. All right. Now --

THE COURT: I want to break for about 15 minutes, if this is a good time.

MR. MARKS: your Honor, it's always a good time for a break, I think.

THE COURT: As good a time as any, all right. We're going to be in recess for 15 minutes, ladies and gentleman. Don't discuss the case with anyone, even each other. We'll be in recess 15 minutes.

(Recess.)

AFTER RECESS

THE COURT: You may continue, sir.
MR. MARKS: Thank you, Your Honor.

BY MR. MARKS:

Q. Mr. Forbes, you're going through all this campaigning and the press wasn't paying any attention to you. And so you knew that you really needed a miracle in order for you to make any headway in this campaign, didn't you?

A. You're talking now about the time of the debate?

Q. About the time of the debate. You knew you needed a miracle.

A. That's very much true, I think, other than if I were excluded and the people had their chance to hear my views, obviously what reason would anyone have to vote for me?

Q. So that miracle that you were hoping for was to get on the [163] debate on AETN, was that not correct?

A. And following that, the equal access time.

Q. Let's turn to that equal access time for just a moment just simply because you brought it up. You were there the night of the debate. Mr. Hutchinson and Mr. Van Winkle were in the studio debating. You met Mr. Goss and he said some things to you and you said some things to him that you have already testified to.

And one of the things you testified to is that you asked Mr. Goss for what you described as equal time which was a chance to get on the air separately if you couldn't get on the debate; is that right?

A. That's correct.

Q. Now we're here out in the lobby and there are a number of people there; is that right? Students and so forth? Other people in the lobby?

A. Coming and going. Coming and going.

Q. Is it possible that in all of this that Mr. Goss didn't understand that you were making a request for equal opportunity that he might -- that he just wasn't on the same wave length with you?

A. Anything is possible and I can't read someone's mind.

Q. Right. Let me ask you, though, to look at page 75 of your transcript there because when you testified earlier you gave a particular answer that I really want the jury to hear. And I [164] think maybe it's best to start at line 10 and read through line 20, and I'll let you read my question to you --

A. Okay.

Q. -- and your -- and your answer.

The question starts, "When you and Mr. Goss were talking back at the studio the night of the debate, is it possible that he could have thought you were talking about getting on the debate or winning the lawsuit about the debate rather than seeking additional time?" and your answer was?

A. "That is possible."

Q. Keep going.

A. "I got the impression that he had me pretty well tuned out. So we may not have been on the same wave length. That is correct."

Q. And would you just read the next question and answer, please?

A. "In other words, he may not have understood that you were requesting additional time outside the debate."

"I have no idea what he understood."

Q. Fine. Now that was the night of the debate, and I know we're talking about some complicated facts here, folks, but I want to go back in time to when you wrote to Ms. Howarth, and that's Forbes' Exhibit 9 that you've all looked at, the letter of August 24th, when you wrote to her and asked her to be on the debate, and then a few weeks later she wrote you and said [165] no.

It's true, isn't it, that when you got her letter saying no, you were very disappointed?

A. At that time I probably – varied, because at that time the debate, I didn't realize in the context of the little thing that it would be – that I was going to have such a blackout through the rest of the media.

Q. But you sure weren't happy about not getting on the debate?

A. No, I never had to when my rights were violated.

Q. Okay. Now did you know at the time that you filed the lawsuit what Ms. Howarth did to make her decision?

A. Other than she wrote me a letter as I told you in this deposition, I have no way of knowing.

Q. Right. You had no way of knowing what facts she looked at or what investigations she did or any of the background of her decision?

A. No, it would be totally irrelevant whatever she did.

Q. And you certainly didn't know whether any political pressure from the State of Arkansas had been applied to Ms. Howarth, did you?

A. To quote Ms. Howarth, you'd have to be naive not to suspect that it might be, but I had no way of knowing.

Q. You had no way of knowing. And you certainly didn't know for sure that there was any political pressure applied, did [166] you?

A. I am certain that if there were there'd be very -- little ways of knowing for sure from anyone.

Q. But you didn't --

A. Oh, no.

Q. You yourself did not know --

A. No.

Q. -- did you, sir?

A. No.

Q. Now, Mr. Forbes, did you know in fact whether there was anything out of the ordinary or irregular about the way Ms. Howarth made her decision? In other words, did you know yourself of your own knowledge that there was anything odd about how this decision was made other than the fact that you got a letter that said you weren't going to be invited?

Let me rephrase the question because you seem to be stumbling.

You didn't know that there was -- you got a letter and the letter said, "We are not inviting you in the debate," but you didn't know that there was anything what we would say in normal language, you didn't think there was anything funny about the process that she went through, and you didn't think there was anything wrong or improper about the process. In fact, you didn't know anything about how she arrived at her decision, did you?

[167] A. The process would be irrelevant because the result was a violation of my rights and that's the way I would look at it.

Q. So you were focusing on the result, and you were very unhappy with that?

A. Like I said at the time, if anybody has a right violated I'm not happy.

Q. All right.

MR. MARKS: Your Honor, if you'll give me just a moment.

THE COURT: Sure.

MR. MARKS: Yes, I do have one other question and I just want to check with my colleague for a minute to see if they have anything, but, Mr. Forbes, we saw your letter, which is Forbes' Exhibit 9 to Ms. Howarth, and that's where you asked to be on the debate.

BY MR. MARKS:

Q. Did you ever send her another letter which said, "If I'm not going to be on the debate I want an additional program all to my own so that I can explain my views to the voters"?

A. No, I did not think it was necessary.

* * *

Redirect Examination of Ralph P. Forbes

[168] MR. FORBES: One thing I do recall is at the time of August 24th, at that time, neither one of my opponents was getting any publicity. I was getting a lot of publicity, especially up until that time, and I was getting calls from the news media and calls from political consultants especially out of the Little Rock area saying, "Wow, this is amazing. You know, two years ago you had one percent in the polls, one percent of the people would admit they were going to vote in for you and the election night you get 53 percent of the state vote, and now in the polls you aren't even in the election area yet and it's before Labor Day and some polls have you as 18 percent of the people in the Third District say they're going to vote for you, and other polls say that 36 percent are going to vote for you," so in that time frame I was the candidate to be beat by the polls, and also the information that the news media was telling me from the polls that they were using, and I might mention there's two kinds of polls. There are polls that are the working polls that they don't give out to the media that's their polls. That's how they decide what they're going to do, and the other polls are the ones that they do in a different way that they hand out, that [169] are the press releases and they're kind of the spin that people want to put on things.

So the real polls were showing that in a three-way race, I was very likely to be elected, and this was in August and September before -- in that time frame when that letter was written.

And the other thing that was very interesting to me which I thought also enhanced my chances was the fact that -- excuse me -- the polls indicated, for example, the Democrat polls indicated that the people weren't so hot in favor of Mr. Van Winkle. They more didn't like Mr. Hutchinson and vice-versa. The people that are going to vote Republican were not really that enthralled with Mr. Hutchinson. They wanted to vote against Van Winkle, so in terms of the way the pollsters were examining their data, both candidates were quite soft and they didn't have hard-core support. Their support was based upon the negatives of the other one, so everybody was quite excited about what my prospects were so at that time I thought "I'm going to get a real free ride on this what they call earned publicity."

Earned publicity means when they do stories about you because you do something newsworthy as opposed to buying ads. I felt that I was a candidate of the people because I had 90 percent of the people. I can't imagine a better poll not calling a few hundred people and saying, "Now I know what the [170] entire State of Arkansas or the entire United States of America is going to do" based on what they call scientific data. I was actually taught day after day, not every day but the days when I had the opportunity, I went out to all 16 counties of the Third District, and 90 percent of the people indicated they would either vote for me or certainly would give me a chance if I could make my case.

And I felt very good about my chances. I felt very good about the news media and, in fact, just before Labor Day, one of the news media down in Channel 4 in Little Rock called me because they thought it was very newsworthy. They had heard that I was going to be running ads which we call pro-life ads showing the fact what they call a fetus is actually a little baby, and showing that this is a human -- it's not a product of conception. This is a human being that is killed in what they call an abortion, and I said yes, and so they did an interview and they had a lot of play in Little Rock. Surprisingly -- the Third District is not in Little Rock. I did get some coverage in Little Rock. I had a lot

of coverage in Little Rock based on the fact that I was blacked out in the Third District.

But before this blackout occurred, Channel 5, Mr. Buretts, and, again, because of one of the -- the Amendment 68 lawsuit. I had filed a lawsuit which stopped the State of Arkansas from using public taxpayers' money for paying for [171] abortions, and because of that lawsuit, they called me in, I believe it was in September 15th or 19th, in that period, and I did an interview on a call-in show.

They thought my candidacy, and this was a bona fide news event because it had to do with -- it's creating news. And yet they still felt they should invite the other candidates to give them equal time out of fairness. So at the time I wrote the letter to Ms. Howarth I had every reason and every expectation to believe that the AETN debate would be just a little blip on the radar screen

It is true that by the time of the debate, October 22nd, the only hope I had of getting my message across any significant number of people was that debate or at second, what they call separate but equal having some time to myself and trying to do with that poster and with the other script trying to make my point, the views that I wanted to get across that people would look at and pay attention to and make it in an interesting way.

So it is true that my -- any hopes I had to express my views by the end of October 1992, resided in the fact that AETN would obey the law. They admit that they should have given me equal time after the debate, but they didn't.

* * *

[172] THE WITNESS: I really can't remember which points we got to here, and I will say in regard to the Japanese television, the reason I told them there was nothing there to sell, okay, like the other times when I was in campaigns, I received mail boxes full of invitations, and they were like stumps speaking where you went out and spoke to people, and I loved to do it and it was -- after I got into it. It wasn't easy at first, but once I got into it, I found that people liked what I said and I looked forward to expressing my views.

Then when this campaign happened, not only -- the only two invitations I received, the only two I received -- [173] one, I asked for myself because I found out about it. We kept trying to find out where -- for whatever reason, I don't know the reason, but the people that were inviting my two opponents were not inviting me. I have no way of knowing why. It's just a fact, and we kept trying to find out where they were going but we always -- it was too late to -- to meet them or become part of that.

And the only two invitations that I had were, one, I had an invitation to speak, I think at a college here in Fort Smith, the day of the hearing with Judge Arnold, and the only other invitation I had was to speak up in Rogers, I believe, and it was the night of October 22nd, the night of the debate when I chose to be in Conway to claim my right to be in the debate and to ask for equal time if I weren't in the debate.

* * *

[173] THE COURT: Anything further, sir?

THE WITNESS: I did ask for equal time. I knew what I meant. I did everything that was required of me and if I understand it, now I don't think it's testimony, I think what I'm going to say now would be an argument so I'll stop here.

* * *

Direct Examination of Susan Howarth

[183] BY MR. MARKS:

Q. Now, Ms. Howarth, this is what's been marked for identification as AETN Exhibit No. 3, and it's entitled "Organizational Structure of AETC and AETN as of October 1992."

A. Uh-huh.

Q. First of all, let me get you to explain why in the world the Governor, Bill Clinton, is listed up there in the first place?

A. Well, the Governor of the State of Arkansas appoints the eight members of the Arkansas ETV commission to eight year terms, staggered eight year terms, and they are the body to which the FCC licenses the AETN's five transmitters.

Q. So it is these folks, the eight members of the Arkansas ETV commission as a commission who are the licensee, the actual licensee from the Federal Communication Commission?

A. That's correct.

Q. All right. Now will you tell me what the AETC, the [184] Arkansas Educational Television Commission is?

A. Well, again, it's the governing board for AETN and it's comprised of eight individuals, again who serve eight year terms. They are the board that's established to set the broad policy by which AETN operates, and they hire me or hire an executive director to manage the network and to facilitate their policies.

Q. All right. Now they make policies. Let's go down to the next level where your name appears as executive director. Would you please explain what the executive director is and what you do, please?

A. Well, as executive director of AETN, I am in charge of the network and the network operations, and the AETN network foundation. That is a support body that receives private contributions that help make programs possible, receive the pledges and all.

I'm in charge of the facility in Conway and the facilities throughout the state. I interpret the policies of the commission and interpret those to the staff who works for me. There are approximately 100 AETN staff.

Q. And what is your responsibility in terms of making decisions that affect the viewers when it comes to making journalistic decisions or programming decisions?

A. I'm the one who ultimately makes those decisions. I've been referred to as the editor-in-chief, the person who, you [185] know, makes the final decisions. I do consider the recommendations of my professional staff about those decisions. Some -- there are obviously hundreds of those things that happen on a daily basis and some I'm involved with more intimately than others but that's my job.

Q. All right. The next level down here shows the name of Larry Foley, Associate Director. Now in 1992 in October what was Larry Foley's job?

A. He's the associate director at AETN, the number two position. That was the position I had originally held when I came to AETN. He is responsible in more of the day-to-day operation of the network.

Q. The next line down and the next name that appears on the chart is Carole Adornetto. She is listed as the production director or shown on the chart as the production director. What was her job?

A. She was one of the seven division heads at AETN, is one of the seven division heads at AETN responsible for the production of the programs, the local programs that we do serve the Arkansas audience.

Q. And then down at the bottom of the chart is the name Amy Oliver. I earlier described her as Lois Lane, but it says something different here. Would you explain as of October 1992, what Amy Oliver's job was and -- in this organization?

A. Well, she worked for Carole Adornetto. She's -- and Amy [186] was the production manager and the executive producer and producer of a number of different programs at AETN.

Q. Now under Amy's name on this chart, I'm sure the jury has noticed that it says that she was an employee of the AETN foundation. What is the AETN foundation?

A. The AETN foundation is a non-profit entity that receives private contributions to support the network. Close to 35 to 40 percent of our funding comes from private sources, and the foundation receives those funds and employs a number of people in addition to the people who are employed through state funding and federal funding. And did Amy work as a staff member of the Arkansas Educational Television Network even though she was paid separately through private money?

A. Yes, all the employees are really employees of AETN. That's the way it works on a day-to-day basis.

Q. All right. I'm now going to ask you to look at something that's already been marked, Your Honor, as -- excuse

me -- as AETN's Exhibit 4, and mercifully I don't have a chart for this, or at least I don't have a chart for the whole thing.

Would you look at AETN's Exhibit 4 and after you've identified it we'll pass it along to the jury so that they can look at it, too. What is it?

A. It's the AETN's programming policy statement.

Q. And do you recall when it was adopted?

[187] A. In 1988, I believe the summer of 1988, it was adopted by the Arkansas Educational Television Commission.

Q. In other words, it was adopted by these eight folks up here?

A. That's right.

Q. And why did they adopt this policy statement? What's the purpose of it?

A. Well, again, their role is to set policy, and by adopting this particular statement they set forth the broad policy that they wanted AETN to operate by. It provides the structure, if you will, for the staff to use as we make daily decisions about programs, and it was set up in a way so that it could be a heat shield for AETN so that it would show that we were not subject to any kind of political pressure in our program decision making. That's very important for us.

Q. Now you used the term "heat shield."

A. Uh-huh.

Q. Where does the heat come from and what does the shield do, and I realize that's a compound questions, Your Honor, so I'll ask it in two parts.

A. Uh-huh.

Q. First, where may the heat come from?

A. Well, the heat may come from any number of sources. Being a state agency it can come from, of course, political sources. Since we receive our funding from a variety of sources, it can [188] come from any number of our funders, whether they be private or government funders. I say it may come from any of those places. Generally we don't receive very much in the way of political pressure or funding pressure.

Q. And when you talk about a shield, how does this policy assist the eight members of the Arkansas ETV commission in functioning as a shield?

A. Well, again, I think any time you adopt a policy and you have it in writing, you can hold it up and say, "We adhere to these guidelines." This shows that the – that we don't give in to political pressure, that we do make our decisions independently and that's why it's important. It's important to have those kinds of policies in writing.

Q. Ms. Howarth, who has the responsibility for making that policy work in real life day to day?

A. My staff and I have the responsibility for interpreting it and making it work.

Q. All right.

MR. MARKS: Your Honor, I'd like to take this chart down and put up another chart which has an excerpt from that policy.

BY MR. MARKS:

Q. And, Ms. Howarth, I'm going to show you a somewhat smaller version of what's been identified as AETN's Exhibit 5. And I know the jury can read it, but it's short, and I'm going to ask [189] you to read it aloud.

A. "AETN maintains public trust in its editorial integrity by shielding the program in process from improper political pressure or influence from program funders or other sources."

Q. Now we've already talked about where the political pressure may come from. But could you just explain to the jury what you conceive the term "public trust" and the term "editorial integrity" to mean? What do those mean to you? Address that.

A. Well, it's very important for AETN to maintain the public trust, for the public to have confidence in the program decisions that we make at AETN. They need to be able to believe us, to be able to know that when they tune into a program on AETN that it's free from political pressure, that no one forced us

into airing a particular program or choosing particular individuals to be on.

If they suspected that we had that kind of political pressure or we wouldn't have this very important trust with the viewers, and they would just doubt -- they would doubt us and it would probably cause them to not watch us and not support us.

Q. Now, Ms. Howarth, I'm going to ask this question in sort of a -- I don't know, maybe a provocative way, but why do you care, why does AETC care what the viewers think? Why is that [190] important to you?

A. Well, it's important for a number of reasons. Number one, I probably would never have gotten involved in public television and be working in this business if I couldn't be involved in an operation that was -- that had the confidence of the viewers, that could produce programs that they really could trust, that they understood we were doing for all the right reasons, all the fair and right reasons, so it's important to me to maintain the public trust for that reason.

Personally, and I think it's important for a lot of our staff for the same kinds of reasons.

Q. I'm going to give you now what's been marked as AETN's Exhibit 6, and I'm going to switch charts here again, Your Honor, and we'll see if we can move this along just a little more quickly because these statements are rather short, but I would like Ms. Howarth to have an opportunity to explain this statement to the jury.

Would you read it aloud, please, Ms. Howarth?

A. Yes.

> "AETN bases its public service programming on its value in the marketplace of ideas, not on financial considerations or commercial pressures."

Q. All right. Now this is from this 1988 policy statement. I want you to explain for the jury what is meant by "the marketplace of ideas" in your understanding, because you're [191] the one who's responsible for making this policy work.

A. Uh-huh.

Q. What is the marketplace of ideas?

A. Well, to me, this is what differentiates public television from commercial television, and that's that we put the viewers first, that it's our responsibility to value a program by how the viewers see it, by the value that they place in the program, not in the value that a commercial sponsor might place in it, so, again, it's what differentiates us from commercial television and we don't consider the financial pressures when we make those program decisions. Instead we consider our viewers first.

Q. And then I'm going to show you what's been marked for identification as AETN's Exhibit 7, and put this board up on the easel. Again, from the same 1988 policy statement on programming, might as well read this, too. It's short.

A. Okay.

> "Locally produced programs relevant and responsive to Arkansas needs, problems, issues and concerns are a very important part of a comprehensive broadcast schedule tailored to the interests of the people of this state."

Q. All right. Now let me start at the bottom this time and talk about the term "tailored to the interests of the people of this state."

[192] Ms. Howarth, what responsibility -- explain to the jury, please, what responsibility that puts on you as the editor in chief at AETN?

A. Well, we need to consider what the people of Arkansas, what the viewers want, when we make our program decisions. We don't just take a schedule from PBS, from the network, and broadcast it. We have to really consider if it's something that the people in Arkansas are interested in, and in addition to that we produce local programs that will kind of fill out the schedule, if you will, and meet the needs of our Arkansas viewers.

It's something that we do that's very similar to what a newspaper editor does. They have to decide what their readers want to read and we have to decide what our viewers want to view.

There are certain constraints that we have. Again, we broadcast generally only 18 hours a day and we have to make decisions. There's financial considerations obviously. We don't

have the budget to buy all the programs we want to buy or produce all the local programs we want to produce, and we have to make tough decisions in order to tailor that schedule, the schedule that we present within the constraints, the financial constraints that we have and the time constraints, the very real time constraints.

Q. Okay. Great.

[193] I'm going to take this down, but at the same time I'm going to ask you to look at what's been marked as AETN's Exhibit 8, and we'll make sure that the jury gets all of these later. I wouldn't want you not to have enough paper.

What is Exhibit 8?

A. It's the statement of principles of editorial integrity in public broadcasting.

Q. That's fairly high sounding. What is this and -- well, let's identify it first. What is it?

A. It's a document that was developed in the mid-1980's by a group of public broadcasters who were licensed to states as AETN is and others who were licensed to universities; therefore, licensed to some kind of Government entity, and those public television stations got together and developed this set of principles in order to protect them from political pressures.

Q. Now why was that a concern of public television stations that were licensed to states, for state universities? I mean, why didn't every public television station participate?

A. Well, some public television stations are licensed to local community boards and receive no direct funding, for instance, from the state, and so they had -- had not had any experiences where they had had that kind of pressure, that some in public broadcasting who were licensed to states had had.

[194] Q. Now what kind of -- when you say "that kind of pressure," what kind of pressure are you talking about?

A. Well, I mean, just for example, oh, I don't know, a governor's office could call and say "We want you to do a show on this," and the station would feel compelled to do it because so much of their funding was coming from the State of Arkansas, for instance, or the State of Alabama, or the State of Mississippi.

Q. And who from Arkansas participated in drafting and developing this statement of editorial principles?

A. Well, it was before I came to AETN, and our previous executive director participated and at least one member of the commission participated in the drafting of this.

Q. Now I'm going to show you what's been marked as AETN's Exhibit 9. And I'm going to put that chart up here as well, Your Honor.

This is an excerpt actually from page 14 of the statement of principles of editorial integrity. Now I notice this was adopted June 7, 1988. Was this adopted at the same time as the programming policy statement we've been looking at?

A. Yes, the commission adopted both papers, both documents at the same time, the same meeting.

Q. All right. And, of course, this is four years before 19 -- the 1992 election, but in any event, would you read this short snippet from page 14 of the statement?

[195] A. The process of developing programs must be managed by the professional staff according to generally accepted broadcasting industry standards so that the programming service is free from pressure from political or financial supporters.

Q. Now in connection with the 1992 debate that Mr. Forbes wanted to begin on and where he was not invited, who is the professional staff who developed the format for the debate and made recommendations to you about the details of it?

A. Well, on the organizational chart, Carole Adornetto and Amy Oliver were the two principal people who worked on a plan for the debate, and then presented them to me.

Q. And who, if anyone, did they consult with in doing that?

A. They worked with Bill Simmons of the Associated Press, the Arkansas Bureau Chief for the Associated Press, who was a consultant, and they talked with him about what the format of the debate should be and they talked with him about who to invite, what panelists to have on, what reporters to include.

Q. Now when you look at this at this particular statement, what did Bill Simmons add to what your staff was -- your staff, the AETN people, Amy Oliver here -- to what she was already doing?

A. Well, again, I had every confidence in my staff that they would adhere to the generally accepted broadcasting industry standards that we're talking about here, the journalistic [196] principles and all, but I believe that you can never be -- have too many heads, I suppose, too many professional heads involved in something like this and that he brought so much credibility.

We had worked with him in previous campaigns. I think in the 1990 campaign he worked with us on some debates and he had brought a lot to the process because of his -- his background and his experience.

Q. Great.

A. Uh-huh.

MR. MARKS: Your Honor, the last poster board.
THE COURT: Okay.

BY MR. MARKS:

Q. Now, Ms. Howarth, I put up here what's been marked as AETN's Exhibit 10, which is another piece from the policy that you've been testifying about, and would you read it and then explain its importance as it relates to this debate here that Mr. Forbes wanted to get invited to?

A. "The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria such as fairness, objectivity, balance and community needs, not on funding considerations."

This meant to me, as the station's chief executive officer, that it was my responsibility to assure that the [197] debates, as we presented them, were fair and were not biased, were objective, were balanced. It was my responsibility to make sure that they adhere to the highest journalistic standards.

Q. Now I'm going to show you again a letter that you've already seen. It's AETN's Exhibit 11 but the jury is privileged already to have it as Mr. Forbes' Exhibit No. 9. We'll try not to have too many duplicates here but it's just easier for me to show this to you.

Now this is the letter that Mr. Forbes wrote to you, and he promoted you to president, probably because he didn't have the benefit of all these charts, but he wrote to you at AETN on February 24th and, as he has already testified, he asked to be included. I think the phrase is "on equal terms with my two opponents in this debate." Now this is August 24, when you received that letter what did you do?

A. Well, I called together our staff, Amy Oliver in particular, and Carole Adornetto, and we reviewed what we had done in terms of our planning for the debates up until that point in time, and obviously they had been planned for several months at that point.

Q. Let me stop you here because they obviously had been planned for several months at that point. Did you know about Mr. Forbes before you got this letter? Do you recall?

A. I remember a discussion that he was -- that the staff [198] thought he was likely to be a candidate, that he was trying to get enough signatures and that we had made a determination at that point in time, Amy had done some research, checked out what kind of press coverage he was getting, what kind of popular support he had from the district, and she consulted with Bill Simmons and with others, and recommended earlier on that we not invite him to participate in the debate. And then, we received this letter.

Q. Now, so even before you got this letter you knew about Mr. Forbes. Now why had you, why had you accepted Amy Oliver's recommendation, before you got this letter, not to invite him to the debates, even before the letter arrived?

A. Well, number one, the debates were designed to benefit the viewers of AETN in the Third Congressional District, that we were putting the debate on for their benefit. And the recommendation that Amy made to me was that the viewers would best be benefitted by a debate between the candidates who had a reasonable chance to win the election, and actually, up until, I don't remember the exact date when Mr. Forbes qualified as a candidate, but during that time, before he was a qualified candidate -- you know, again we had some of these discussions, what if.

But, until he was a qualified candidate, of course, we did not invite him to participate in the debate. When he became a qualified candidate we determined again that the [199] viewers would best be served by limiting the debate to the two people who had a reasonable chance to win. She presented evidence -- evidence. She had done some research where she said that in his last election he had received very few votes, had not received much popular support. He had raised very few dollars and hadn't filed any paperwork with the Federal Election Commission, the Secretary of State's office.

Q. Now, now let me just stop you here.

A. I'm sorry, okay.

Q. In terms of filing paperwork with the Federal Election Commission, what does that mean? Please explain, explain that to the jury.

A. Well, it's my understanding that candidates are required to disclose, or to file statements, noting how much money they have raised for their campaign, how much as been contributed. And I think we have heard some of that earlier on about how much Mr. Forbes raised compared to some of his -- to the other candidates in that race. So, for us, it was important to know that because it indicated how much popular support he had. So that was one of the things that Amy reported to me when we had this discussion.

She also talked about the fact that Mr. Forbes didn't really have any kind of formal campaign headquarters except for his house. It appeared that he had no paid staff and very few volunteers working for him, other than, you know, some [200] family. And then, it also was, she said that she had checked with some journalists throughout the state and reported to me that no one was taking, considering Mr. Forbes a serious candidate. They did not think he had a chance to win the election and they weren't even going to -- they weren't even planning to report his name on election night in the results.

Q. Let me focus on the term "serious candidate."

Would you explain to the jury what you mean by the term "serious candidate" because I think we have all seen Mr. Forbes and we obviously all think he is a serious gentlemen.

A. For us it meant that he didn't have a serious chance to win the election, that he didn't have serious support among the constituents, the voters, in the Third Congressional District. He didn't have popular support and didn't have a chance to win the election.

Q. Now, when you are considering putting this debate together for the viewers and you are trying to consider what's best for the viewers, why does it matter whether or not Mr. Forbes had been able to generate popular support? Why is it important?

A. Well, for us, the debate was only going to be an hour, and after you subtract out the opening introductions and the closing credits and all, it was going to be about 50-53 minutes of debate time. And, as I said before, our broadcast time is a very valuable commodity, very, very valuable. We don't have a whole lot of it, we don't have a whole lot of [201] money to devote, resources to production of local programs.

So, if you take 50-53 minutes and divide it in half then we were able, then we would have been able to, as we did, give each of the two candidates who had a serious chance to win the election 25 minutes or more to debate the issues. If we divided it three ways then the candidates would have received substantially less time to discuss the issues. And, for us, it didn't seem appropriate, it didn't seem like it was the right thing to do, to take someone who had such a small percentage of support and give him equal status in this debate and an equal amount of time. We were trying to reflect what the viewers and the voters were telling us in the information that we had received.

Q. Okay. you had already made this decision and then this letter comes in from Mr. Forbes dated, it's dated August 24th, and he asks "that I be included on equal terms with my two opponents in this debate."

A. Uh-huh.

Q. What did you do?

A. Well, again, as I remember it, I, we called together another meeting, or we had several discussions about this, and I asked Amy to please look into this again and to find out what was the current -- what's the current status of Mr. Forbes' campaign; has he gained any ground since we last looked into this?

[202] And she came back to me with a report that basically said nothing's changed. That he still doesn't have a campaign headquarters, still isn't raising money, still does not seem to have any popular support in the district other than the 2,000 signatures that he was able to get to qualify as a candidate. And, she talked again to journalists, she called around again and reported to me that again nothing had changed from anyone else's point of view either. So she recommended that, at that point, we not include --

Q. Let me just stop you.

A. Okay, sure.

Q. When you say "nothing had changed from anyone else's point of view either" --

A. Uh-huh.

Q. -- would you just explain that to the jury a little bit more in detail. I mean what was the conclusion that you drew from all this?

A. Well, again in the same way that I asked Amy, you know does Mr. Forbes have any support in the Third Congressional District, she asked people who cover politics in the state what their perception was, and what the facts were and they said, "No, Mr. Forbes still --" his campaign wasn't catching fire, there was no growth and support. There was nothing to justify us giving him equal time within the context of the debate.

[203] Q. Okay. Now, Ms. Howarth, I'm going to divert here from Mr. Forbes' letter, because you just used a term "equal time." I would like you to explain to the jury something that is in addition to equal time, something called reasonable access for federal candidates.

A. Uh-huh.

Q. And I'm going to ask you to tell the Court and the jury that this is Section 3129(a)(7) of the Communications Act of 1934, although that's where it comes from, I would like you to explain what you understood and what you understand the term "reasonable access for federal candidates" to mean.

A. Well, candidates for federal office, and that would include for the U.S. House of Representatives, for the Senate, for the Presidency, all can ask a television station, public station or a commercial station, for time and the station is obligated to give

that time. It's something that is important and it's a legal requirement and it's something that we were well aware of at AETN. As a matter of fact, during the 1992 election there was a candidate for president, a minor party candidate for president, who asked for access time and we provided it to them, I think we gave them 15 minutes, they had a pre-produced program, and we aired it I think at 10:00 one night during the campaign for President.

Q. Now what would you have done if Mr. Forbes, instead of asking to be included in the debate, what would you have done [204] if Mr. Forbes had just said, "I want my own half-hour, I want reasonable access"?

A. We would have given it to him. That, to be honest, that's been the thing that surprised me about this, because even in my letter to Mr. Forbes advising him that we were not inviting him to the debate, I gave him the number of the FCC and I fully expected him, or them to counsel him that he had -- if he wasn't aware, that he had the right to reasonable access time. And I thought that probably the debate was his number one priority but I fully expected that once he did not gain access to the debate that he would ask for access time and that we would give it to him.

Q. Were you listening for a request or anticipating a request from Mr. Forbes for reasonable access?

A. Absolutely. I really thought that was the next step. That when he was not on the debate that he would ask for access time, and my staff was fully aware that, to be on the alert. I wasn't there that evening so, you know, I can't say whether Mr. Forbes tried to ask for time or not but since he had written to us before I fully expected we would get a letter or get some kind of a request or if he asked for it that my staff would have reported it to me.

Q. Now you say that your staff was fully alert.

A. Uh-huh.

Q. Why were they fully alert for a reasonable access request?

[205] A. Well, again, Mr. Forbes had been so intent upon getting into the debate, I knew that it was his right and I advised him of this. We had a discussion about it. The programming people even knew to think about where there might be a time slot

between the 22nd and the election. We were prepared because we just -- we thought it was the logical thing for Mr. Forbes to do.

Q. Let me just be sure that the jury understands this. If Mr. Forbes, if instead of asking to be in the debate, or in addition to asking to be in the debate, if he had said, "I want my own separate program," what would you have done?

A. We would have given it to him.

Q. Right away?

A. Absolutely.

Q. All right. Now Ms. Howarth, I am going to show you what's been marked as AETN's Exhibit 12 for identification, and ask you to identify it, please. What is this?

A. This is the letter that I wrote to Mr. Forbes in response to his letter requesting time on the debate.

Q. Now, what did you tell Mr. Forbes?

A. Specifically:

> "AETN has made a bona fide journalistic judgment that our viewers would best be served by limiting the debate to elected nominees of the two major parties."

And then I went on to tell him how to get in contact with the [206] FCC if he had any kind of a -- let's see,

> "that you should feel free to contact the Fairness Political Programming Branch of the Enforcement Division, Federal Communications Commission, if you want to pursue an administrative appeal."

Q. Now why did you put that business about the FCC in there?

A. I thought it was the forthcoming thing to do. I wanted Mr. Forbes to -- we wanted to try to be fair as we did this. I mean, we took this whole debate and the whole, our coverage of the election, very seriously. We wanted to do the right thing. We checked with our legal counsel in Washington with your colleague, Mr. Gray, to confirm our understanding of the rules regarding political broadcasts.

Q. And what conclusion did you draw from that about whether the FCC would require you to include Mr. Forbes in the debate?

A. Mr. Gray confirmed our -- my understanding, which was that it was our decision to make. It was our decision about who to invite to the debate, that we were no different from a commercial television station in that regard. It was our decision.

Q. An editorial decision?

A. An editorial decision.

Q. A news judgment?

A. That's right. But I wanted Mr. Forbes to know that he had a remedy, that there was a place for him to go to appeal our [207] decision and that's why I included that information.

Q. Now, you said in your reply to Mr. Forbes something there about the viewers. Would you read that again please?

A. "AETN has made a bona fide journalistic judgment that our viewers would best be served by limiting the debate to elected nominees of the two major parties."

Q. Why did you feel it was the appropriate thing to do, to -- when you wrote this letter to Mr. Forbes and said to him that you weren't going to invite him to the debate, why did you think it was appropriate to explain this in terms of AETN's viewers? What's the reason for that?

A. Well, that's, I mean, in simple terms, that's our reason for being. I mean, we at AETN are there to serve the viewers. That's, I mean, we're not there to serve the government, we're not there to serve our funders, we're there to serve the viewers.

And in any decision I make I try to have -- keep the viewers' interests as best I can ascertain them, determine them, in the forefront of any decision that we make.

Q. Now you found out from Ms. Oliver that Mr. Forbes' campaign, to use your phrase "was not catching fire." How does that relate to serving the interests of the viewers? What's the connection?

A. Well, again, if you think about the amount of time that we were going to devote to the debate, if Mr. Forbes, if we [208] included him in the debate and gave him equal status with the two other candidates and gave him an equal amount of time in the debate then that would have been breaching that trust with our viewers because it would be giving him a status that he had not earned through the support that he had from the voters.

In other words, someone would tune in and see that Mr. Forbes was there and given an equal amount of time with two other people and they would begin to doubt AETN or, if they believe AETN, they would say that it might sway them to vote in one way or another and it might be misleading to our viewers.

Q. Well, now Mr. Forbes earlier talked about the fact that he wanted to have this level playing field.

A. Uh-huh.

Q. You have Mr. Hutchinson up here and you have Mr. Van Winkle, the Democrat and the Republican, Mr. Hutchinson was the Republican. Did you consider that Mr. Forbes was on the same level as Mr. Van Winkle and Mr. Hutchinson?

A. Not from the – not from what we knew, no. He wasn't on at the same level. He was down here and the other two were up here and it didn't seem right to us to give him equal standing and include him in this program.

Q. Okay. Now, you know one of the things that we were talking about and I'm going to go back, if I may Your Honor, [209] and put up the chart of how AETN was organized. Because Ms. Howarth -- I now want to get into the question of political pressure. I've put up the chart again for the jury, which is AETN's Exhibit 3 -- you've got that there in front of you -- and I want to direct the jury's attention to the eight members of the Arkansas ETV Commission who are the people who hire you.

A. Uh-huh.

Q. You made this decision about Mr. Forbes. What sort of discussion did you have with those folks, the eight members of the Arkansas ETV Commission about whether Mr. Forbes ought to be invited to this debate?

A. I don't recall any discussions with any of them. Possibly in my quarterly routine reports to the Commission and at our regular meetings I might have reported on the matter but I didn't have any discussions with them about it.

Q. Well, what sort of political pressure, if any, did you get from anybody in the State of Arkansas there, about whether to invite Mr. Forbes or not?

A. I didn't receive any. No one contacted me about inviting Mr. Forbes or not inviting Mr. Forbes.

Q. When you say "any," are you referring to any political pressure? You received no political pressure?

A. Right. Correct.

Q. Did any of your staff report to you that they had received [210] any political pressure to invite or not invite Mr. Forbes to this debate?

A. No, no one mentioned anything like that to me.

Q. All right, give me just a second if you will.

I'm now going to ask you a question that is a little bit different from what we've been talking about up to now because you've explained I think to the jury the basis on which you made your decisions. But, you know, Mr. Forbes was talking earlier about the fact that he really wanted to tell the people of this district what his views were so I want to ask you whether you made your decision not to invite him to the debate based on what his views were. And, to ask the question properly, to what extent, if any, did you consider Mr. Forbes' views in deciding that you weren't going to invite him to the debate?

A. I didn't consider his views. That wasn't the criteria, that wasn't behind how we made our decision. It wasn't something we considered. Viewpoints were not considered.

Q. Now why would you decide to invite Mr. Forbes based on the level of popular support or the lack of popular support that his campaign generated instead of thinking about what his views were? I mean, why would you do that?

A. Well, again it seemed to us that the best way to serve our viewers was to try to come up with some kind of an objective measure, so we looked at again the kind of support that he had [211] versus any kind of subjective measure. I mean, considering one's views to me is not the kind of thing one does when one tries to have a fair and balanced program. You look for subjective kinds of criteria, or objective kinds of criteria versus subjective.

Q. Now you're the editor and chief of this organization?

A. Uh-huh.

Q. Suppose for a moment that you wanted to consider his views. Could you do that if you wanted to?

A. As a matter of fact, up until, it is my understanding that I could, yes. That we are absolutely the same as a, again

newspaper or commercial station or we could make these kinds of decisions based on any criteria that we wanted to use. That we're really no different, again from a newspaper editor. A newspaper editor can run an article on Mr. Forbes because of his views or not because of his views and we could do the same thing. But, that's not what happened in this case.

Q. I'm going to now show you what's been marked for identification as AETN's Exhibit 13 and ask you to identify it and explain to the jury what it is. I'm sure they're disappointed that I don't have a big chart of it but they'll get to see it later. What is this piece of paper?

A. This is a memo that Amy Oliver typed up with a handwritten note on the top of it to Carole Adonetto, her boss, but it basically outlines the different objective measures, the [212] different criteria that she evaluated when she made her recommendation to me not to include Mr. Forbes in the debate. It is something I asked her to do after we had written Mr. Forbes the letter. I thought it was important to have some kind of documentation in the file about why we made our decision.

Q. Now it couldn't be, could it, that the fact that you are regulated by the FCC, made you think that it might be a good idea to have some document in the file?

A. Yes, as a matter of fact, the FCC does require us to keep in our public file any request that candidates make for time and our response to them and I thought it would be good to have not just the letter but the back up to it, and that was this memo.

Q. Well, you've got the memo there, I don't want you to read the whole thing because it's getting late, but could you just briefly summarize the points in there for the jury so that they know what Ms. Oliver told you about why she made this recommendation and what she found out in her looking at Mr. Forbes' campaign and checking to see what he was doing.

A. Again, they're some of the points I made before, but point number one was that in his last race he had received only 13.8 percent of the vote and that the Arkansas voters did not consider him a serious candidate.

Point number two was that the news organizations also did [213] not consider him a serious candidate, giving him little, if any, coverage.

Q. When you say "news organizations," what news organizations is that memorandum referring to?

A. Well, this one specifically talks about the *Arkansas Democrat*, about a story that they ran about Mr. Forbes that was one inch long and ran on the obituary page and that was one of the few articles, if any, that Amy was able to find.

Point number three was that the Associated Press and a national election result reporting service did not plan to run his name in results on election night.

Point number four was that he apparently had little, if any, financial support, failing to report campaign finances to the Secretary of State's office or to the Federal Election Commission.

Point number five, the final point, is that there is no "Forbes for Congress" campaign headquarters other than his house, and all other candidates invited appear to have at least one office in the district and some have two with volunteers and paid staff and he did not.

Q. Ms. Howarth, I'm now going to show you another document and, ladies and gentlemen, I know we've got a lot of documents here but we are coming to the end, at least for the moment. This is AETN's Exhibit No. 14, and would you please identify this?

[214] A. This is a memo from Amy to me on October 12, 1992 and it's a memo where Amy documents a phone call that she had, an interview she gave to the Arkansas Radio Network.

Q. And, what, very briefly, would you tell the jury what this memo says?

A. Again, it reiterates some of the same information, she was asked by the reporter why we decided not to invite Forbes and she said it was because we didn't think he was a serious candidate for several reasons, he got only 13 percent of the vote in the last time, in his last election, he hadn't raised enough money to be listed in the Federal Election Commission files nor had he filed any financial reports with the Secretary of State's Office by the April and July deadline. She said she mentioned the

fact that he apparently isn't taken seriously by the state's press which was rarely covering him, if covering him at all.

Q. I see. All right. Ms. Howarth, we are here -- we are here in Federal Court today and you have been through a lot of hassle over this decision not to invite Mr. Forbes to the debate.

A. Uh-huh.

Q. If you had to do it over again, what would you decide?

A. We would make exactly -- I would make exactly the same decision.

* * *

Cross Examination of Susan Howarth

[218]Q. You say that the main -- your main interest is in the viewers? This is your reason -- the reason you're there?

A. Uh-huh. Yes.

Q. I don't know how I can ask this just right. If there were -- has AETN ever run re-runs?

A. Yes.

Q. And so your precious time can be used to run reruns?

A. Yes, but sometimes they are more cost effective.

* * *

[225]Q. You say you wanted to be -- do the right thing --

A. Uh-huh.

Q. -- do the fair thing.

A. Uh-huh.

Q. Be forthcoming.

A. Uh-huh.

Q. Did you feel any obligation since you testified that you believed you had a duty to allow me to have what you call, what, equal access? Or what was the word you used?

A. Reasonable access.

Q. Reasonable access.

A. Uh-huh.

Q. You felt that you were required to do that?

A. I knew that we were required to offer you reasonable access if you requested it.

[226]Q. Excuse me. You were required to offer me reasonable access?

A. If you requested it.

Q. If I requested it.

A. Correct.

Q. You don't believe you have an affirmative duty to say, "Here's what you need to do," or "This is your right, and this is available to you"?

A. No.

* * *

[231] Q. -- and AETN is a licensed broadcaster, network this state, is there anything that says if you allow candidate A to have a certain amount of access to your broadcasting facilities you have to afford equal broadcasting opportunities to candidates B, C, D and so on?

A. In certain circumstances, yes. Certain circumstances that if it's a non-news event thing you have to do that. If it's a news event which is exempt from equal time requirements which debates have been ruled to be exempt, you do not have to afford equal time opportunities to other candidates. But again, reasonable access is available to any candidate for Federal office.

Q. We'll get back to reasonable access.

A. Okay.

Q. Just talking about this affording equal opportunity, there is four exemptions and you're speaking specifically to one, am I correct, addressing the news event?

A. Uh-huh.

* * *

[238]A. I knew that, and the only thing we ever did was confirm our understanding with our attorneys that it was our right or our responsibility to be able to invite whoever we wanted to the debate.

Q. So it's your testimony that you talked to, I believe, an attorney in Washington, D.C.?

A. Uh-huh.

Q. And the attorney -- okay, now you're saying now confirmed your --

A. Understanding.

Q. -- understanding that if you wanted to -- if you liked my viewpoint -- for example, you wanted to endorse me, you could invite me on? Is that what I understood you to say?

A. It was our understanding, my understanding -- and again, the Washington attorneys confirmed this, that we could invite anyone to participate in the debate for whatever reason. It was our judgment, our editorial decision to make.

* * *

[253] THE COURT: Go ahead and try however you wish to, sir. If I decide it's taking too long, I'll tell you I think it's taking too long.

Q. Okay. I think I'll ask you is it true? Is it true that AETN fulfills a unique role for all Arkansans by providing information, building a better quality of life and facilitating personal growth and awareness? This kind of television is a lifelong learning experience.

A. Yes.

Q. And then you always tried to do the best of its kinds.

A. Yes.

Q. Let me back -- I didn't follow through on one of my questions. I'm sorry. On the surveys and the rates.

[254] Do you know what the ratings are of, say, the commercial television stations, compared to your average of two?

A. Oh, it's been a while since I've actually looked, but theirs are greater than ours.

Q. Theirs -- significantly greater?

A. Yeah, uh-huh.

Q. So would you judge your success in achieving your goals and the policy of AETN by these surveys in the polls?

A. The ratings are just one of the things we look at to evaluate whether we're successful.

Q. But if you had low ratings and if someone came to you and said, "Well, these people aren't doing very well in the polls; they're not doing their job," you're saying that's not a fair criteria to judge AETN by?

A. What I'm saying is that the ratings are one of the things we look at, and we look at other things when we evaluate our service.

Q. But if that was one of the things that someone were judging you on and your job on would you think that was fair?

A. It would depend on who was judging and for what purpose.

Q. Well, say that AETN had to go off the air and no longer -- because there's only so many airways and these people are only reaching a certain small number of people, and, therefore, they're wasting these precious frequencies that there's only so many of. Let's give these frequencies to somebody else. [255] Would you argue that that's not fair because you are serving a purpose by getting certain information out that would not otherwise be brought to the public?

A. Of course I would.

Q. Okay. In your judging of the program -- aspects of program quality your own policy says that you go for thoroughness, credibility, fairness, virtuosity.

Now I looked that up. I'll tell you the definition I looked up. Meaning ethical, virtuous, honest, honorable, principled, right, trustworthy.

A. Uh-huh.

Q. By those definitions --

A. I agree with those. That's what we do.

Q. Another thing that you want to do, I looked up the definition here. "Stimulate." That means enlivening, energizing, galvanizing, motivating, arousing, exciting, provoking and awakening.

A. That's what we try to do.

Q. You try to do that.

A. Uh-huh.

Q. Was one of the reasons that Ms. Oliver told you that I shouldn't be on the debate was because I would provoke or upset the debating structure as maybe they wanted to envision it?

A. No, not that I remember.

[256] Q. Does the word "grandstanding" bring back any memories?

A. No.

Q. None of your memorandums?

A. I suppose it could be there somewhere but I don't recall it.

Q. So if -- was the reasons for not having these -- we'll come back to that later, but I want to ask you now.

A. Uh-huh.

Q. If one of the reasons for not having me included in the debate was because I would make it exciting or arouse interest, would that be a justifiable reason by your own policy to exclude me from the debate?

A. It wasn't one of the reasons.

Q. No, no. I'm just asking you if it was, if I show you in a memorandum that it was.

A. I'm sorry.

Q. Okay. If -- I'm just asking you by your own policy statement here --

A. Uh-huh.

Q. -- would that -- if somebody said that one of the reasons for keeping me out of the debate was because I would instead stimulate or enliven viewer interest, would that be a justifiable reason to exclude me from the debate?

A. You don't look at these things in isolation.

Q. No, just yes or no. This is your policy.

[257] A. I guess I just -- I can't imagine that being one criteria that we would consider and consider in a vacuum.

Q. So it is your testimony that if somebody came to you and said, "This guy is going to change it and it's not going to be boring any more so we shouldn't have him on," you would have rejected that?

A. Yeah. If someone said to me, "We -- but including Mr. Forbes in the debate, the debate will no longer be boring," I

would have said that's an irrelevant criteria in this matter. It's not the particular thing we're looking at, but I mean it would not have mattered in this case.

Q. Well, wouldn't it have been relevant to you to say, "Oh, here I have an opportunity to stimulate my viewers so this is a good idea to bring him in"?

A. Again, you're taking one word out of a whole line of words, and one particular program, no matter how hard you try can never accomplish all of those things.

Q. Okay. Getting away from just one word. You've got a lot of words here in your policy.

A. Uh-huh.

Q. We'll just ask all the words together and then see if your answer is the same, but collectively all these words: informative, challenging, innovation, meaning something new --

A. Uh-huh.

Q. -- boldness, accuracy, balance.

[258]A. Uh-huh.

Q. Enlightening, interesting, educational in the broadest sense.

A. Uh-huh. I would say that the program as we did it met probably, oh, six of those words, accomplished six of those goals fairly well.

Q. And if I had been included wouldn't you have embraced and fulfilled all of those words in every aspect?

A. No. I'm not certain that we have because I don't believe that we would have been fair and balanced, perhaps not as informative in terms of providing the views -- enough time to the views of the candidates most likely to win the race and the candidates that the viewers were supporting.

* * *

[260]Q. This is Mr. Simmons wrote a letter on your behalf to Mr. Dennis Scott inviting you.

A. That's fine.

Q. And you had no problem with inviting him?

A. Had no problem with inviting the candidates that we invited.

Q. And you don't remember whether they were actually on, but if they had accepted your invitation, you would have put them on and broadcast their debate; am I correct?

A. Correct.

Q. I have here a copy of Tuesday, May 30th, 1995, *Arkansas Gazette*, which I've got some copies for you. I'd like you to read this paragraph.

A. Uh-huh.

> "In 1992 Thornton was challenged by an unknown Republican from Benton, Dennis Scott, who spent just $6,212. The incumbent was reelected with 74 percent of the vote."

Q. That means that with Mr. Scott -- you didn't say in his case, "Gee, this guy only has $6,000 in his campaign."

A. Uh-huh.

Q. In fact, at that time, you didn't have the 6,000 because this is much earlier. This is -- so you didn't say "He doesn't have enough money. We're wasting people's time to put [261] him on."

A. No, we said that he had the support of the Republican Party and had garnered the nomination and the public support that that indicated.

Q. By "public support." Do you know what Mr. Scott had to do to get on the ballot to be the candidate?

A. Not specifically.

Q. You didn't check into that?

A. I don't know if our staff did.

* * *

[266]Q. Okay. So I'm going to read that definition again.

> "AETN must not permit its facilities to be used for partisan political purposes by any political organization, officeholder or candidate for office."

Is that true?

A. Right.

Q. Now you mentioned before that you admitted that you ran the ad advertising the debate.

A. Correct.

Q. And the only two people that you listed in this Congressional debate was -- were -- find a copy of that. I want to look at the -- or have you look at the ad if I can find it. The only two pictures and the only two candidates mentioned are Van Winkle and Hutchinson.

A. Uh-huh.

Q. You stated that the reason that you chose Mr. Scott is because he was the Republican candidate in the Second District race.

A. Correct, that he was endorsed by the Republican Party which showed a certain amount of support, indicated a certain amount of support.

Q. And your ad stated that the purpose of the debate was to educate and inform the public about the issues and the candidates.

A. If that's what you say it says.

[267]Q. Well, I have here a copy.

A. Okay. My Exhibit No. 13.

Q. Okay. Thank you, Mr. Marks.

Would you read that to the jury, please?

A. Uh-huh.

> "Do you know your candidate? Get better acquainted with the candidates and the issues. Democrat John Van Winkle of Fort Smith and Republican Tim Hutchinson of Bentonville debate the issues as they campaign for the Third Congressional District seat, live tonight at 7:00, AETN, where learning never ends."

Q. Thank you.

A. Uh-huh.

Q. If says, "Do you know your candidates?" Was I a legally-qualified candidate?

A. Yes, you were.

Q. Were you educating the public that I was?

A. No, not in that debate, no.

Q. But you were educating the public that there was a Democrat and a Republican, partisan candidates, my two opponents?

A. We were letting people know that there were two candidates that were going to debate that evening, yes.

Q. And it says "To get better acquainted with the candidates [268] –

A. Uh-huh.

Q. – and the issues."

A. Yes.

Q. Was I a candidate?

A. Yes.

THE COURT: She said you were.

BY MR. FORBES:

Q. Okay. Did I have views on the issues?

A. I assume you did.

Q You assumed that. Have you ever read the book *1984* by George Orwell?

A. Yes. Quite a long time ago.

Q. A long time ago. And you're familiar with the concept of the non-person?

A. It's been a long time.

Q. Okay. I'll refresh your memory. There was a thing called the ministry of truth. In the ministry of truth what they did was they decided what masses of people were allowed to know or not to know, and if they decided that a person wasn't worthy of being recognized by the Big Brother's Society, Big Brother took that person and their existence and put them down the memory hole so that they became a non-person.

A. Uh-huh.

Q. The state knew they existed but the public was not allowed [269] to know they existed. Does that refresh your memory?

A. To a certain extent, yes.

Q. Does that sound kind of chillingly descriptive of what's going on with this ad?

A. It really doesn't to me.

Q. You can't see it. You honestly can't see that?

A. I testified before the way we came about putting these debates together, and we sincerely believed that it was in the best interest of our viewers to have a debate between the two candidates who had a likely chance to win and to give them an adequate amount of time to express their views.

Q. Did Mr. Scott in the Second District race, did he have a reasonable chance of winning that race against Mr. Thornton?

A. At the time we made the decision to invite him, we thought he did.

Q. Why is that?

A. Again, I don't have a list of the criteria we looked at but one of the things would be that because he was the nominee for the Republican Party, that would indicate a certain amount of popular support.

Q. I believe you testified that you invited Mr. Terry Hays and Ms. – you didn't say the names. Blanche Lambert and Terry Hays. They were the two candidates for the First District –

A. Okay.

[270]Q. – Congressional.

A. Okay.

Q. And you invited both Ms. Lambert and Mr. Hays.

A. Again, that sounds right to me.

Q. This is the First Congressional District of Arkansas.

A. Uh-huh.

Q. Which they gerrymandered the districts but basically the first district is the delta and the Mississippi River line. In the entire history of the State of Arkansas has anyone but the Democratic nominee ever won that election in general election.

A. I don't know, Mr. Forbes.

Q. Did anyone on your staff know.

A. I don't know if they know.

Q. When they're looking for someone to have a reasonable chance of winning an election wouldn't they have looked at the history of a candidate and a party and say, "Well, this guy has

never won. His party has never won. They don't have a chance so we are wasting valuable, precious air time if we invite them?" Isn't that one of your criteria?

A. The criteria is to look. If one is going to sponsor debates – to look to provide a forum for the candidates who have a reasonable chance to win.

Q. How did you determine that Mr. Hays had a reasonable chance to win?

[271]A. Again, because he had the endorsement and the support of one of the major parties in Arkansas. That would have been one criteria. Whether there were more than that I don't specifically remember or -- nor do I have any knowledge of that.

Q. Did you ask Ms. Oliver to call all the media and ask them, "Does Mr. Hays have a chance? Let's hear opinions. Should we put him in the debate?"

A. I don't recall. No, I don't think I made that request.

Q. Would the same thing be true in respect to Mr. Scott in the Second District race?

A. No.

Q. Didn't ask the media what their opinion would be?

A. Huh-unh. No.

* * *

[272] Q. Okay. One of the purposes and goals of AETN -- this is also established by our state legislature. AETN was established by the state.

A. Correct.

Q. "You must further the goals of a Democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens and voters to make informed judgments about the issues of our times."

A. Okay.

Q. "In matters of public importance that may be controversial. Special attention must be invested to [273] assure fairness in treatment of different points of view."

A. Yes.

Q. You say you have an affirmative obligation to do this.

A. Yes. To be fair.

Q. Well, even beyond fairness, you have an affirmative obligation to give special attention to see that something that's controversial doesn't get censored but rather gets broadcast.

A. Yes.

Q. And AETN must provide a bulwark against program domination by any single point of view?

A. Yes.

Q. And it must make efforts to reflect the pluralism of our society by providing access to minorities and all points of view?

A. Yes.

* * *

Redirect Examination of Susan Howarth

[288] Q. We heard from Mr. Forbes about Mr. Scott who was a Republican and about a couple of other folks who were Republicans, were Democrats, major party candidates, as well -- as we all used the term.

When you make a decision about debates and about whom to invite to a debate, what's the significance to you if somebody has the Republican or the Democratic nomination?

A. To me, it means that they have the support of a [289] significant number of people that we serve, our viewers or a significant number of people within Arkansas. And it -- it's not specifically that they are a Republican or a Democrat, the endorsement of the party means that they have a certain amount of support.

* * *

Direct Examination of Amy Oliver Barnes

[292] Q. Ms. Oliver, I'm going to show you now what's already been received as AETN's Exhibit 15. This is a memorandum

from Carole Adornetto, your boss, to you, and it's dated May 12th, 1992.

The subject is the election '92 debates, and the jury doesn't have these documents yet. You'll get them later. But would you please identify what this memorandum is?

A. It's a memo that Carole, who is my supervisor, sent to me asking me to get with Bill Simmons of the Associated Press, and start discussions about debates for November -- well, actually in October.

Q. This is October of 1992?

[293] A. 1992, right.

Q. All right. When you received this memo, what did you do?

A. I contacted Mr. Simmons at the Associated Press and we started laying out the format and discussing other formats that other debate holders had used and what had been successful for them and what had not been successful for them. We actually asked for some tapes and for some debate rules, I think, debate outlines from other places, and started working on that.

Q. And what did you and Mr. Simmons eventually decide about how you were going to recommend that these debates be structured?

A. After looking at the other debates format, we decided that it was probably going to be fairest to all to stick with the major party candidates, inviting them, for the Federal election.

Q. And why did you conclude that?

A. In other states, there had been several people on the ballot who had not received a party endorsement, who had not received popular support, and it tended to dilute the discussion of those debates when everyone was invited up there, so we decided to limit it to the major party candidates.

Q. Now when do you recall first hearing about the fact that Mr. Forbes was going to be a candidate?

[294] A. I don't recall the exact time but I know that there was some discussion about a petition drive.

Q. And what did you and Mr. Simmons do when you first got information that Mr. Forbes was seeking signatures for

petition to become an independent candidate here in the Third District?

A. Well, we went ahead and mailed out the invitations, and we felt at that point it was time to go ahead and get everybody because we knew everybody was involved in their campaigns, it would take time to look at the proposals that we had made and so on and so forth, so we just went ahead and mailed out the invitations, decided we would deal with the issue as it came up.

Q. Did you send an invitation to Mr. Forbes?

A. Not at that time, no.

Q. And I'm now going to show you what's been marked as AETN's Exhibit 16. This is a June 19, 19 -- excuse me -- June 19, 1992 memorandum to Carole Adornetto from you. It's got a little scribbling on the corner.

Please look at this memorandum and describe it to the jury, please.

A. Mr. Simmons and I had discussed the possibility of Mr. Forbes entering the race, and so I sent a memo to Carole outlining our discussion. I had -- I also produced a weekly program called "Arkansas Week" and journalists appeared on [295] that program, and I had asked some of those journalists what they thought about the Third District race, and so after that in considering other things that Simmons and I talked about, I sent this memo to Carole telling her that I didn't think we should invite Mr. Forbes to the debate.

Q. What were your reasons as outlined in that memorandum?

A. Mainly it was that there didn't seem to be any public support for Mr. Forbes and there hadn't been any public support in past races for Mr. Forbes.

Q. When you made your inquiry of these other journalists whom you talked to, what did you conclude from that inquiry?

A. After talking to them that was my conclusion from the information that they gave me that there was no widespread or even competing support for Mr. Forbes.

Q. Now, Ms. Oliver, you just explained to the jury that you worked in news organizations in this state fairly extensively.

You're obviously an experienced news person here. What did you know about Mr. Forbes from your own background, if anything?

A. I remember that he had been or was a member of the American Nazi Party, and would have been what I -- well, others would have called a white supremacist. But other than that I think that's probably it.

Q. Now when you went to go through your fact checking to figure out whether you were going to invite Mr. Forbes or not, [296] to what extent, if any, did you go to check what his political views were in 1992?

A. Absolutely none.

Q. Now why is that?

A. It wasn't -- it wasn't a part of the decision-making process.

Q. What were the tests that you used in the decision-making process?

A. We were looking at how he had performed or I was looking for how he had performed in past races, in past elections. I was looking for any signals, any guides of public -- gauges of public support so I looked for donations, contributions.

Gosh. I looked for coverage. Where other journalists in that area are statewide covering him, and there wasn't any, negligible.

Q. Now what discussions did you have with Carole Adornetto or with Susan or with other people at AETN about your findings about the amount of popular support or the lack of popular support that Mr. Forbes had?

A. I relayed that information to them, that he had not by deadline filed any reports with the SEC to indicate that he had contributions. I related my discussions with other journalists who said that there was no coverage, that no one was being assigned to cover the campaign of Mr. Forbes as they were in other districts. There just seemed to be no support [297] for him.

Q. Now later on, there were Federal election -- that Mr. Forbes filed a Federal election commission report or a Secretary of State's report or that this time you didn't -- you couldn't find one.

A. Right.

Q. Is that right?

A. Right.

Q. All right. I'm now going to show you a -- well, before I show you the next exhibit, let me ask, Mr. Forbes had made a request in August -- August 24, 1992, and the jury has already seen the letter that he sent to Ms. Howarth, and you know we had Ms. Howarth testify about it yesterday, and the letter came in and Mr. Forbes asked to be included in the debate, and what happened then?

A. I believe Susan asked me to go back and check with the sources that I talked to before, newspaper reporters and so on about the coverage, if anything had changed as far as any indicators of public support, of voter support for Mr. Forbes, and it hadn't.

Q. How careful was your investigation when Susan asked you to go check this again?

A. I considered it carefully. That I proceeded carefully. I checked with again not only reporters in Little Rock but also reporters in the Third District. Reporters, columnists, [298] political analysts, so on and so forth, checked with the Secretary of State's Office about voting results.

I checked -- and also about campaign contribution reports. I think I did a pretty thorough investigation.

Q. Now what did you recommend to Susan?

A. My recommendation stood. It's from my earlier recommendation. I didn't think that it would be of service to our viewers to include Mr. Forbes on the debate.

Q. All right. Now I'm going to show you what's been received already as AETN's Exhibit 13. This says on it "Ralph Forbes." It has a little stamp that says "Received by Carole Adornetto on September 14, 1992," and then it's got some scribbling up here with the letters "AO." And I'm going to ask you to identify this document.

A. This is a memo I sent to Carole and, according to my note, I gave a copy to Susan and one to Mr. Goss. Again, it was outlining the same things that I just discussed about the seriousness of Mr. Forbes' campaign as the voters were seeing it, and, again, that he had lost his last race. He had not performed well in other

races, the state's news organizations were not considering him a candidate, a serious candidate, meaning that he had not a serious chance to challenge the two main front runners in the campaign.

The Associated Press, Mr. Simmons had told me that the Associated Press in its national election results were not [299] going to report Mr. Forbes' results in that reporting process and that he had little, if any, financial support.

Q. Now was this the memorandum that Susan asked you to write so that it could be put in the Federal Communications Commission public inspection file, do you recall?

A. I believe -- yes, I believe so.

Q. All right. I'm now going to show you what's been previously received as AETN's Exhibit 14. This is a memorandum to Susan Howarth from Amy Oliver re "Forbes/ARN interview," and it's dated now October 12, 1992. This is ten days before the debate was going to take place.

Would you please identify this document for the jury?

A. This is a memo I think to Susan to let her know that I had received a call from a reporter, Paula Cooper of the Arkansas Radio Network, asking about our decision not to include -- or to invite Mr. Forbes to the debate, and outlining, again, what I had told Paula which was that the voters obviously did not consider Mr. Forbes a serious candidate, obviously because there was no coverage going on in the area and because there was no appearance at rallies, no invitations seemed to be going out his way to appear to voter groups and so on.

Anyway, the same things I had outlined in the other memos that he had little voter support in previous elections and so on.

Q. All right. Now, Ms. Oliver, I'm now going to show you a [300] bunch of thick, official-looking State of Arkansas documents, and I want to assure the jury that I am not going to ask her to read a tiny snitch of this.

First, is what's been marked as AETN's Exhibit 17. It's the Arkansas Election Results for 1986 compiled by the Secretary of State, and I've got something tabbed here. This is the election results for the U.S. Senate in 1986.

MR. MARKS: Mr. Forbes, that's Exhibit 17.

BY MR. MARKS:

Q. Would you please read the -- who the candidates were and what percentage of the votes each received?

A. Dale Bumpers -- I'm sorry. I'm going to have to hold this closer. My eyes are going bad here.

Q. That's all right.

A. Dale Bumpers received 62.28 percent of the vote. As a Hutchinson received 37.7 percent, and Ralph Forbes received one one-hundredth of a percent.

Q. That is .01 percent?

A. Correct.

Q. All right. I'm now going to show you what's been received as the -- as AETN's Exhibit 18. This is the Secretary of State's compilation of Arkansas Election results for 1990, and I've got the 1990 runoff primary for Lieutenant Governor in the Republican Party here.

Now who are the two candidates?

[301] A. Muskie Harris, Kenneth Muskie Harris and Ralph Forbes.

Q. Now this is the Republican Primary runoff, so the winner becomes the Republican candidate for Lieutenant Governor and gets to run against the Democrat; is that right?

A. In the general election, right.

Q. In the general election. All right.

What percentage of votes did the two candidates receive?

A. Kenneth Muskie Harris received 86 percent, and Ralph Forbes received 13.8 percent.

Q. And, Ms. Oliver, the results in that book are tabulated by county, are they not?

A. Yes.

Q. Now how many counties did Mr. Forbes win?

A. It -- I'd have to look closely but it doesn't appear he won any, just glancing. No.

Q. That's the answer?

A. Yes. He won no counties?

A. Right.

Q. Let me move now to what's already been received as AETN's Exhibit 20. Now this is the document from the Secretary of State of Arkansas and it's a report of receipts and disbursements for Mr. Van Winkle's campaign in 1992. So this is the report of the amount of money raised by the Democratic candidate who was one of Mr. Forbes' opponents.

And I'm going to ask you to look at that report and tell [302] the jury how much money Mr. Van Winkle raised.

A. $430,516.

Q. All right. Could you just repeat that again for me?

A. Yes. $430,516.

Q. All right. Now I've got AETN's Exhibit 19 already received which is the same sort of report but for the Republican candidate, Tim Hutchinson. And I'm going to show you and ask you to read to the jury how much money Mr. Hutchinson raised in that campaign.

A. His net contributions were $370,630.

Q. And now I'm going to show you what's previously been received as AETN's Exhibit 21. This is another one of these reports from the Secretary of State of Arkansas and it's a report of receipts and disbursements for Mr. Forbes. The same question, Ms. Oliver. How much money did Mr. Forbes report as having raised in this campaign?

A. $9,754.

Q. Now I'm going to show you the official Arkansas election results for 1992. This has been marked as AETN's Exhibit No. 22. It's already been received, and on page 49 there is a tabulation of the results for the 1992 Arkansas General Election for U.S. Representative of the Third District.

I'd like you to tell me first how many candidates there were and what their names were.

A. John Van Winkle was the Democratic nominee. Tim [303] Hutchinson was the Republican nominee. Ralph Forbes was an independent. And Rex Petty was a write-in candidate.

Q. How many total votes were cast?

A. Total votes were 249,494.

Q. How many votes did Mr. Hutchinson receive?

A. Mr. Hutchinson received 125,295 votes.

Q. Was he the winner?

A. Yes. With 50 percent of the vote.

Q. And Mr. Van Winkle's vote tally and percentage?

A. 117,775. He had 47 percent.

Q. And Mr. Forbes' figures?

A. He had 6,329 votes with 2.5 percent.

Q. Now, Ms. Oliver, I suppose we ought to -- we'll leave Mr. Petty because I want to concentrate on Mr. Forbes and on your recommendation to Susan that Mr. Forbes not be invited to this debate.

Hindsight is always a luxury but we're here in 1992. We have these reports about the election results, and obviously we had this long litigation and you've had a great deal of time to think about your recommendation to Susan that Mr. Forbes not be invited to this debate.

If you had the opportunity to go back in time and make this recommendation over again knowing what you know now, what would your recommendation be to Susan?

A. It would be the same, the same one that I made to her two [304] years ago -- or three years ago.

Q. And why is that?

A. I believe it was the right thing to do. I believe that the voters had told us in past elections that they didn't consider Mr. Forbes' candidacy a serious challenge to any other candidate and I believe they were telling us that in 1992, too.

Not only indicators prior to the election but the final election results.

Q. Ms. Oliver I'm almost finished but I just want to ask you a couple of questions about whether you received any political pressure from anybody whatever about your -- about the recommendation that you were going to make to Susan about whether to invite Mr. Forbes. To what extent, if any, did you receive any political pressure at all?

A. None. I received absolutely none. And being a reporter for 20 years, I would have sensed it and I would have immediately rebelled.

* * *

Cross Examination of Amy Oliver Barnes

[306]Q. Okay. Proximity, relevance, conflict, novelty and interest are the ones you remember?

A. Right.

Q. So in doing anything with the newsworthiness, those would be sort of a guideline?

A. Yeah, those were a guideline. I remember Mr. Tyson and my [307] professors now, teach me that, and I've learned along the way that the overriding factor is viewer need and interest or reader need and interest, that every case has to be judged individually. That there are no rules in journalism so to speak.

Q. No rules in journalism?

A. Right. No absolutes.

* * *

[313] Q. Now, did you happen to think "Gee, I better call Mr. Forbes and ask him, 'Are you going to file one?'"

A. You know, I think I discussed that with another reporter and I think I discussed it with Simmons about his discussions or his reporter's discussion with you or someone else about that. I recall something about, that Simmons told me I believe, that you had no plans to file or something like that. But I couldn't say for sure.

Q. So either Mr. Simmons or someone from AP was calling me to check on things and you were going by what they told you.

A. Yeah, that someone had mentioned that, yes there was no.

Q. Any other reporters that you had talked to that had called me and checked on some of these others things? We'll save time if I don't have to ask you every question about if you called me.

A. Nothing that comes to mind right now.

Q. But you never called me about anything?

A. No.

* * *

[318] Q. I have here a document, it's my Exhibit – I'm going from memory. I'm going to say 9. It's the Certified Election Results from the Secretary of State.

A. Uh-huh.

MR. MARKS: Hang on a second. Is it this one?
MR. FORBES: Yes.
MR. MARKS: It's 3.

BY MR FORBES:

Q. It's Plaintiff's Exhibit No. 3 and on page, it's got a 14 on the bottom. It's the 1990 primary, the Lt. Governor Republican Primary.

A. Uh-huh.

Q. Which was a three person race, and in this column there are two, the top two, and I heard you say something about – it's hard to read. So I took and I put little check marks under the percentage in both columns for certain counties.

A. Uh-huh.

Q. There are 16 counties in the Third District of Arkansas [319] and I would like for you to read for the jury the county, if you can, I'll say just the percentage.

A. The percentage of both candidates?

Q. I put the check mark right, just this column.

A. For Ralph Forbes?

Q. Yes. Can you tell?

A. Well, sometimes your marks aren't clear about which. Okay. Baxter, I know Ashley County is not in here, so Baxter is 55 percent, Benton is 60 percent, Boone is 55 percent, Carroll is 54 percent, Crawford is 55 percent, Franklin is 50 percent, Johnson is 51 percent, Logan County 58, Madison County 63, Marian 50, Newton 71, Polk County 57, Pope County 41, Searcy.

Q. It should be Sebastian.

A. Well, is it Scott, is that what you –

Q. Okay, Scott is what I want.

A. Scott. Okay, 63, Sebastian 55 and Washington 54.

Q. Okay. Thank you.

A. Uh-huh.

Q. These are the percentages that, of the votes that I received in a three way race.

A. Uh-huh.

Q. On May 29, 1992.

A. Right.

Q. Is it very rare in politics, or is it rare in politics or [320] in an election, that in a three way race, anyone ever in a three way race, wins an absolute majority and escapes a run-off?

A. In a three way race I don't know what the figures are on that. You mean the chances?

Q. Would it be newsworthy to you? I mean, normally, isn't there a run off when there is more than one candidate in a primary?

A. Sometimes yeah. But whether I could say it was a majority of time, I don't know.

Q. Polls are based on statistics; is that not true?

A. As far as I know.

Q. Well, that is the theory behind it.

A. Right.

Q. Now here we're not doing a sample poll of ten voters in Pope County or 20 voters in Sebastian County. These are all the people who were eligible to vote that wanted to vote and went out and voted in that election. Is that not true?

A. In the primary.

Q. The primary. In the 16 counties that comprise the Third District, which it would be this Congressional race, you read yourself 63 percent, 71 percent, 55 percent, 60, 58 percent. Does that to you show a substantial amount of popular support for my candidacy in these sixteen counties that make up the Third District of Arkansas?

[321] A. It says you got the majority of votes in that race.

Q. That was in 1990.

A. Right.

Q. Two years, in fact a year and a half before you decided I had no popular support in this area.

A. It was the primary before the run off that you lost.

Q. The run off. Okay.

Let's go back to this document here. The statewide totals, this is the official totals.

A. Uh-huh.

Q. What is the statewide total that I got?

A. The statewide percentage?

Q. Uh-huh. It's at the very bottom.

A. Okay. Well, according to this document, this is the primary. Okay. I thought you were asking me about the run off.

Q. No, no.

A. Okay. Well, the statewide totals in the primary you got 46 percent and Kenneth Musky Harris got 35.

Q. In this race on May 29th, statewide, I got almost 47 percent and my opponent got 35 percent.

A. Uh-huh.

Q. And the next one he got eliminated? I mean there was a third person.

A. Uh-huh.

* * *

[326] Q. Excuse me, I think I'm very close to being done with this.

You said that you decided early on that you only wanted to invite the major party people to the debates.

A. Uh-huh.

Q. Was that based upon partisan? Isn't that the very definition of partisan parties?

A. It was based upon what had worked in other debates.

Q. I'm not asking. I believe you were here and you heard me ask Ms. Howarth about the restrictions and the limitations on partisan.

A. Uh-huh.

Q. Support or by AETN. I'm asking you now, when you invited [327] only the major party candidates, is that not by definition a partisan decision?

A. No really. It was the fairest decision we could make.

Q. Was it fair to me?

A. I think it was fair to the people of Arkansas, to the voters of Arkansas and I had to consider them.

Q. Was it fair to the several thousand people that signed my petitions?

A. It was fair to the several thousand people who hadn't voted for you or who weren't showing support for you.

Q. I've got a question here. I can't figure out my notes.

You said that you had talked to a number of journalists and one of them was the round table, "Arkansas Week".

A. Yeah, I was producing "Arkansas Week".

Q. Okay. But you stated that you had asked the people. Who were those journalists?

A. Max Brantley.

Q. Max Brantley.

A. Rex Nelson, Joan Duffy. We had -- we were focusing on some of the districts or on all of the districts, and the races in the districts so we were trying to get in journalists from those districts. If I recall I think Jack Mosely appeared, Dave Edmark, those were the Arkansas Week guests I spoke with. I spoke to other journalists.

Q. Did all of them tell you not to invite me?

[328] A. No. I was getting general information from them. I never asked if you should be invited or not.

Q. What were your general information type questions?

A. What kind of coverage you were receiving. What kind of support, if you were appearing at rallies. What kind of support you had. If people were inviting you to appear. If you were appearing on courthouse squares and shaking hands or in public places and so on.

Q. And if I were doing that and they weren't aware of it would that be a valid basis for you coming to your conclusion?

A. They would be aware of it I would think.

Q. How would they be aware of it?

A. Well, because they were covering the rallies that all the other candidates were showing up at. And all the other places the candidates were going.

Q. Your testimony is that you never called me to ask me what I was doing?

A. Hmm. I don't guess I did, no.

* * *

[331] Q. In an earlier election, 1986. This would be my column here showing my vote total for that column.

A. In 1986, okay. This was with Gene Novels.

Q. Yes.

A. Your vote total was 46.98.

Q. That's a statewide vote total.

A. Right.

Q. That's nearly 50 percent by the official results.

A. Right.

* * *

[341] BY MR. FORBES:

Q. Is it your testimony that you decided not to call me because, in large part, because I had no chance of winning the election?

A. I didn't determine that there was a need to call you. I had facts that I had gathered from other sources.

Q. Going one step further, was it your determination to tell the station or to tell Ms. Howarth, not to invite me because I really had no chance to win the election?

A. I didn't think that you were a challenger.

* * *

Redirect Examination of Amy Oliver Barnes

[342] Q. Mr. Forbes asked you a great deal about the 1986 [343] Republican Lieutenant Governor's primary and he also asked you many questions about the 1990 Republican Lieutenant Governor's primary, which was obviously four years later.

How would you describe how Mr. Forbes did in the 1986 and 1990 Republican Lieutenant Governor's primaries?

A. He did okay. In the first primary with Gene Nobles in 1986 I think he had 46 percent of the vote, and in 1990 he won a spot in the runoff.

* * *

[344] Q. And how did you evaluate his record as a candidate, generally, in all the races that he had tried to run in and had run in, in fact?

A. Overall he had not made a significant impact.

Q. Now, Ms. Howarth, Susan, asked you to go back, and she asked you two or three times during the course of the summer and early fall of 1992, to go back and make a judgment, make a recommendation, about whether to invite Mr. Forbes.

How did you factor in Mr. Forbes' record as a candidate, with these four losses, in judging whether to invite him? How much of a part did that play?

A. That was one of the guiding gauges I was looking at. It was one of the things that told me that the voters of Arkansas, our viewers, had considered Ralph Forbes, didn't particularly care to hear what he had to say obviously by their repeated votes and their repeated rejections.

Q. All right. Now, I want to shift because I want to move away from these particular votes for a moment.

This morning Mr. Forbes also asked you a number of questions about philosophy and about his views and how you [345] might -- how you might or might not look at his views, and I just want to make sure we're all crystal clear on this.

How much did you consider Mr. Forbes' views in making your recommendation to Susan?

A. Not at all.

Q. And why not?

A. It was not a factor in the final decision. It -- the overall guiding force for me was what would best serve our viewers. And a discussion concerning his viewpoints could be said to have served our viewers but, it seemed from the record, that the viewers didn't care to participate in that discussion or hear that discussion.

Q. Very well. And when you say "the record" you are referring to what you discovered about Mr. Forbes' --

A. Right.

Q. -- campaign in the Third District?

A. Right.

Q. And the fact that it just hadn't attracted much support?

A. Right.

Q. Or any support?

A. Right.

* * *

Direct Examination of Oscar Eugene Goss

[350] Q. Why were you there?

A. Well, I was there because we expected Mr. Forbes to show up and demand participation -- demand to be allowed to participate in the debate. And management felt that some -- someone in a position of responsibility at the network should be there to speak for them.

Q. Now, briefly, would you describe what happened that evening?

A. Okay. We had placed the -- in the first place no one is allowed in the studio area except the actual participants. By that I mean no political attendants, or political assistants. So, all of those folks, for both candidates, were placed in the conference room just off the lobby. The press, for all practical purposes, was back in the studio; although some were up in the lobby, anticipating a visit by Mr. Forbes.

Mr. Forbes did arrive. I couldn't tell you what time. It was very close to broadcast time when he arrived and asked to [351] be -- and you know was welcomed -- and was asked to be -- asked to be allowed to participate in the debate and was told no, that the decision had been made that he should not participate. He was invited to come in and sit and watch.

Q. And that evening, what instructions had Susan given you, if any, about a -- the possibility of a reasonable access request from Mr. Forbes? And, by "reasonable access," I mean a request

for reasonable access -- what you've heard of as Section 312(a)(7) of the Communications Act, and this would be a request to speak, to appear, in his own program. Not part of the debate, but to appear separately?

Now, it's long question so I'm going to ask it again. To what extent, if any, had you had instructions from Ms. Howarth, about a reasonable access request that might come from Mr. Forbes?

A. Well, both she and our legal counsel had advised us that those are, for want of a better phrase, trigger words. And if any candidate for Federal office comes to any broadcast licensee and demands or requests reasonable access, they are to be given reasonable access.

So, my instructions were, if Mr. Forbes asked for reasonable access, I was to respond that that would be relayed to management and, in my opinion, he would be granted reasonable access because the law required it. Then I was to, you know, report back to her.

[352] Q. "Her," being?

A. Susan Howarth. Uh-huh.

Q. Now, were you expecting -- were you primed -- were you ready to hear the words reasonable access?

A. I'd have to say I was listening for them.

Q. And did Mr. Forbes request reasonable access?

A. He did not use those words in any way during that evening.

* * *

Cross Examination of Oscar Eugene Goss

[355] Q. "Mr. Goss, ten or fifteen minutes of the debate are already gone, but I'm willing to drop the lawsuit. I don't want to sue anybody. I just want to express my views. If you'll let me in now, even with less time I'll accept that."

* * *

A. I have some recollection that you spoke to me in terms of requesting equal time. And I said to you that the equal time statute did not apply.

Q. Okay. But we're talking about -- I did -- do you recall me asking you what I needed to do to prepare when I had -- I think I used the phrase my separate but equal time?

A. I have a recollection that you used the phrase that you'd requested equal time and the equal time statute does not apply in the case of debates.

Q. Do you recall --

A. I'm sorry. In the case of news events. Go ahead. Excuse [356] me.

Q. Do you recall my saying "separate but equal"? Does that phrase ring a bell?

A. I don't recall "separate but" no, sir. But it wouldn't make any difference.

Q. I understand your position.

A. Okay. Fine.

Q. I'm just asking if you recall --

A. All right. Fine.

Q. -- my saying that.

A. No, I don't recall that.

Q. Do you recall me asking you to convey to the other two candidates that I wanted to challenge them again in a debate and on the time that I expected to have from AETN?

A. I recall your saying or indicating that you would like to meet with the candidates, and I told you that they would -- that we would advise them that you were present and wanted to see them.

Q. And then you asked me to go out --

A. And I said if you visit with them you'll -- you know, if you all have a meeting you'll have to visit outside. And at that point you -- thereabouts you went outside.

Q. You say you were tuned for the trigger words. "Reasonable access"?

A. That's correct.

* * *

[374] Q. Okay. Are you familiar if I told you the 16 counties of the Third District, would you know if you cover –

A. Yeah, we cover approximately about three-quarters of the counties in the Third District.

Q. Would you describe your news and your station as dominant or very important in this area?

A. It's a very close race between us and Channel 5. In the Fort Smith area, Channel 5 is stronger because of their signal a little bit. And in northwest Arkansas we're very dominant, two to one.

Q. So if someone were interested in news and the political area in the Third District of Arkansas, would they be remiss not to contact you and your station?

A. I would imagine because really in our area there's only Channel 5 and us doing nightly news.

Q. Did Ms. Amy Oliver or anyone from AETN contact you in regards to my candidacy in 1992?

A. I remember Amy asked me to be a part of the debate, to be on the panel.

Q. All right. You were one of the panelists in the debate in Conway, Arkansas?

A. Right.

[375] Q. Other than that, did AETN or Amy Oliver or anyone contact you in regard to my candidacy?

A. I don't remember that, no.

* * *

[380] Q. Mr. Cannon, do you recall that you or your station gave any coverage at all to my candidacy in 1992?

A. I believe we did.

Q. Do you know why you gave that coverage?

A. Because you were an independent candidate, if I remember right.

Q. When you decide to put something on the news, do you use some criteria to do that?

A. Yeah.

[381] Q. Is there such –

A. Yes.

Q. – a thing as the element of newsworthiness?

A. Sure.

Q. Do you remember what those are? Can you tell us what some of those might be?

A. It's been a while since I studied the books, but it's just kind of embedded in you.

Q. Okay.

A. You know, the – the location of the story is relevant to us. Do you want me to list the whole –

Q. If you can remember very briefly, very briefly. If not, I remember you told me seven earlier.

A. The novelty of the story, the relativeness of how it affects our viewers' lives comes into play. Let's see. The interest, of course, whether we think it's of interest to our viewers, things like that.

Q. And those are the reasons that you decided whatever news stories about me you did?

A. Oh, we also have a public commitment, I believe, when it comes to races that it's our – it's our duty and it's our job to let as many people that want to hear what the candidates have to say. It's our job to be that platform in a way.

Q. So as a commercial station, a non-government entity, you're saying that you feel it's your duty to serve the public [382] by allowing someone like me to express my views when it's newsworthy.

A. If you're a legitimate candidate, yes.

* * *

Direct Examination of Burnham Wilcox Edson

[386] BY MR. FORBES:

Q. Could you state your name and your occupation and business residence for the jury, please?

A. Yes, my name is Burnham Wilcox Edson. I work for KFSM TV. I'm the news director. That's at 313 North 13th.

Q. Fort Smith?

[387]A. Forth Smith. We usually use a post office box.

Q. Okay. First of all, I want to apologize. I'm going to make this very briefly, and I want to thank you for appearing.

A. Okay.

Q. In respect to the 1992 elections, do you recall inviting me or having me on your station at any time?

A. Yes, I do.

Q. Okay. Can you tell us when they were and -- tell us when they were.

A. I can do that. I might have to get down to the back. I'm going to have to use my cheaters, too.

Q. I do, too. I hate to admit it but --

A. It gets worse every day, I think. The first time we had you on was May 13th, 1992.

Q. Okay. Did you call me and invite me? Do you recall?

A. Yes.

Q. Can you tell us why you did that?

A. We were doing all of the candidates for the Third Congressional District.

Q. And in respect to me in particular why did you fell -- did you have any -- I don't want to put words in your mouth. I believe you told me some reason why you had called me.

A. Well, we considered you a candidate. You filed -- or at least we thought you had filed and you were a candidate. We had had you on previously, and we had you on after that.

[388] Q. I'm sort of losing my train of thought here. You said another time period within this time frame.

What was the date of that?

A. The second time we had you on that year was September 2nd of '92.

Q. Okay. And the reason for that was something with a news event?

A. I've got the write-up that goes into your appearance, and basically the reason we had you on September 2nd -- may I read it?

Q. Sure.

A. "Independent Congressional Candidate Ralph Forbes says a jury and not a judge should decide whether life begins at conception. The London, Arkansas, man is petitioning the courts for a trial by jury to determine whether unborn children are legal persons under the law. He compares his case to the same Dred Scott decision," and on and on.

And basically that's why we had you on.

Q. So I was a candidate but it was also what's called a bona fide news event?

A. Exactly.

* * *

[391] BY MR. FORBES:

Q. If someone were very interested in the political situation here in the Third District, would a logical course of action be to contact you and-or Channel 5?

A. Generally speaking, I think most candidates do. Most candidates want to be on. Most candidates want to be heard. Most candidates want to answer questions from the viewing public.

Q. Does the viewing public have an interest in asking these [392] questions?

A. I wish you'd see our phones light up.

Q. When I was on did you have the call-in service?

A. We did.

Q. Was there any interest in calling me?

A. I don't remember or recall any dead air in terms of my having to ask you questions. I think the problems were --

Q. Do you recall ever telling me that it was an unusually large response?

A. Mr. Forbes, I can't recall that. You know, there are so many, every day, five days a week.

Q. Let me put it this other way. Can you remember if there was a fairly large response?

A. I'm sure there was a good response because I don't recall any time where we had to sit and I had to ask you questions because you were asking the questions.

Q. So there appeared to be an interest by the public or the viewers –

A. Cqorrect.

Q. – in what I had to say?

A. Correct.

Q. Did Amy Oliver or anyone from AETN call you in respect to my candidacy and ask you any questions about it?

A. Not that I recall.

Q. During the entire 1992 campaign. I mean, it's a long [393] period of time.

A. All I remember is AETN asked me to come down and be part of a debate.

Q. And did you do that?

A. I did do that.

Q. And this is the only call you – it's the only contact you remember with them?

A. That's correct.

* * *

Jury Instructions

[475] You should keep these in mind as I explain the law applicable to this case. What all that said was that you will decide this case by answering one or more – actually it will be at least two of the following three interrogatories.

The first one reads, and by "interrogatory" that simply means a question that you're asked to answer.

Interrogatory Number 1. Do you find from a preponderance of the evidence that the defendants' decision to exclude Mr. Forbes from the debate was influenced in any way by political pressure from anyone inside or outside of the Arkansas Educational Television Network? And there is a place for you to answer either yes or no, a place for you to have your foreperson whom you will have elected when you go in, date it, sign it.

When you've completed that interrogatory go on to Number 2 which says:

Do you find from a preponderance of the evidence that the defendants excluded Mr. Forbes from the political debate because of his objections or opposition? I'm sorry, let me try that again.

Do you find from preponderance of the evidence that defendants excluded Mr. Forbes from the political debate because of objections or opposition to his views? A place for you to answer either yes or no, again, a place for the [476] foreperson to date it and sign it.

* * *

[477] Plaintiff contends and has the burden of proving that defendants excluded him from the debate because of objections or opposition to his particular views. The Government violates the First Amendment when it denies a speaker access to a political debate, to suppress the point of view he holds on a topic that is encompassed within the subject matter being addressed.

The Government may exclude a speaker if he wishes to address a topic not encompassed within the purpose of the debate or for any other reason that is reasonable in light of the purposes to be served by the debate and the surrounding circumstances.

* * *

Jury Excused to Begin Deliberations

[484] THE COURT: The jury is out of the courtroom and the door is closed. It is my practice to simply say at this point that I will consider the record made on the instructions earlier to be remade at this time. I will, however, give either of you an opportunity to make any record you wish to on the Court's reading of the instructions, any record to be made.

MR. MARKS: Your Honor, I'm not sure, but other than the 11th Amendment point, we have nothing.

THE COURT: All right. That has been raised, of course, already, yes, sir. You may give the exhibits to the jury and they may begin their deliberations.

Let me say one thing. You all may be seated just for a moment.

MR. FORBES: Your Honor, is that an exhibit also?

THE CLERK: I haven't taken them back yet.

[485] THE COURT: They're going to go back just here in a moment, and it is an exhibit, also.

It occurred to me while you all were doing closing arguments that the record is really not very clear in respect to an issue that the Court of Appeals spent quite a little bit of paper talking about, and that is the type of forum that this is.

I guess it should be obvious from the Court's instruction that the Court has ruled that the type of forum we are talking about in this case is a non-public forum. That's what at least five of the 11 justices of the Court of Appeals believed when they wrote the opinion reversing this case and reversing their case.

We spent a good deal of time trying to determine whether that issue, the determination of that issue was a question of fact for a fact finder to determine or a question of law for the Court to determine. We couldn't find anything that was on point at all. I see Mr. Marks grinning. He may have done the same thing and run into the same issues, probably misposted that work if that was done but in any event whoever did it.

MR. MARKS: Certainly not I, Your Honor.

THE COURT: The Court believes that -- well, one of the reasons that has not come up before is very few, if any, of these cases have ever been tried to a jury before. There [486] have been very few jury First Amendment cases tried.

The Court has concluded that at the very most it's a mixed question of law and fact. Under the circumstances of this case there was not any dispute about the circumstances of the situation. This was a public television station which doesn't normally provide access to the public at large. They did in this case do it only for purposes of this debate. The Court has determined, therefore, that based on uncontested facts this is a

non-public forum much like the school -- mail facilities that were at issue in *Perry v. Perry Local Educators*, 460 U.S. 37 (1983).

You all may remember that that's a case in which a school teacher's union won an election or won -- somehow or other they got a right to represent the school teachers. They were given access to the school mail facilities. The rival union was not.

This seems to me to be more closely that kind of a case than any other kind of case. Besides that, as I said, at least five of the Court of Appeals judges seemed to believe that it was that kind of forum; therefore, the Court believes that it is and I have instructed it on that basis as should be obvious in the instructions that were given.

Now having said that, does either side wish to say anything?

MR. MARKS: Let me move this around, Your Honor. [487] I'll try to say this as succinctly as I can.

Our view is that a non-commercial educational television station licensed to a state is a non-public forum.

THE COURT: Right.

MR. MARKS: The only way it can forfeit that status is if it lets itself be subject to political pressure.

THE COURT: Yeah, you've said that several times. I know that's what you believe.

MR. MARKS: Yes.

THE COURT: I can't support that by any cases but I know that's what you believe.

MR. MARKS: And, Your Honor, we may have an opportunity to talk about the *Chandler* case and in your case some community service and those others.

THE COURT: And the Eighth Circuit might agree with you. I recognize that. And I don't think they have said that yet and I don't think they said that in this case, as I said, but they may, and if they do the way I crafted the interrogatories I hope that that means that if they say, "Yeah, he's right," then all they have to do is say "Reversed and dismissed," not "Reversed and remanded for a new trial."

MR. MARKS: Your Honor, I share your hope, but what it all comes down to at this stage of the trial is that we certainly agree that AETN is a non-public forum and that's appropriate.

[488] I should add only one thing, Your Honor. I know that you took out the word "solely" from Instruction No. 6 or 8.

THE COURT: Yeah. And it comes out of a Supreme Court decision I found out after I took it out.

MR. MARKS: And I think that I was going to say that I think the word "solely" is properly in there, and I suppose it's incumbent on me to make that point in the record. I think it's properly stated that only if the sole motivation is to suppress his speech is it an issue under the First Amendment and actionable under the First Amendment.

THE COURT: I think that's certainly appropriate for you to make that record. Anything else?

MR. MARKS: No, Your Honor.

THE COURT: Thank you all very much. Court is in recess until the jury returns.

MR. FORBES: Those questions –

THE COURT: Yes. I'm sorry.

MR. FORBES: – on the forum issue were not really decided by the Eighth Circuit, I believe is my understanding.

THE COURT: No, they did not. They did not. I would agree with that.

MR. FORBES: But the State –

THE COURT: They talked about it a lot but they did not really decide that issue. I would agree.

MR. FORBES: Yes, sir. I would say that the State on [489] their petition for certiorari did make those arguments, and the Supreme Court basically denied *cert*. And what effect that has I –

THE COURT: Well, it has a lot less than the news media seems to think it has. At least most of the news media.

MR. FORBES: And I think there would be another question which I hope I put in my proffered – is that how you pronounce it, proffered or proffered instruction?

THE COURT: Either one. Either way you like to say it.

MR. FORBES: Thank you.

The question of the protection of – while it's inherent in everything we're doing here, very specifically the inherent protection what will protect in the future? Perhaps Democrats, Republicans, Masons, Baptists, whatever, in other words, I think that needs to – I don't know that we really addressed that very specifically.

THE COURT: You all, if the opportunity arises and I suspect it will one way or the other, you all can argue all this in the Court of Appeals. This case is done, it's back there in the jury. You all can argue all these things –

MR. FORBES: I just thought I should have said that for the record.

THE COURT: You all can argue all these things and I'm not trying to keep you from making any record, either of [490] you, that you want to make, but we don't need any argument now. It's past that.

Carl, I saw them open the door. Are they wanting to go home? A while ago.

COURT SECURITY OFFICER: Oh, no.

THE COURT: That didn't mean anything. Okay.

Court is in recess till the jury returns or decides to go home, whichever it is.

(Recess.)

* * *

After Recess

[502] THE COURT: Mr. Davis, has the jury reached a unanimous verdict?

MR. DAVIS: Yes, Your Honor, we have.

THE COURT: If you'll hand those papers to the marshal, please, sir.

The Court's going to read the interrogatories that were completed.

Interrogatory No. 1. Do you find from a preponderance of the evidence that the defendants' decision to exclude Mr. Forbes from the debate was influenced in any way by political

pressure from anyone inside or outside of the Arkansas Educational Television Network?

The answer is no. It's signed by Mr. Davis and dated with today's date.

No. 2 reads, Do you find from a preponderance of the evidence that the defendants excluded Mr. Forbes from the political debate because of objections or opposition to his views?

The answer is no. And it's also signed by Mr. Clinton Davis, the jury foreperson and dated with today's date.

STATE OF ARKANSAS

SECRETARY OF STATE

W. J. "Bill" McCuen
Secretary of State

To All to Whom These Presents Shall Come, Greetings:

I, Bill McCuen, Secretary of State of the State of Arkansas, do hereby certify that the following and hereto attached instrument of writing is a true and perfect copy of

THE CERTIFIED ELECTION RESULTS FOR THE FOLLOWING:

MAY 27, 1986
REPUBLICAN PRIMARY FOR LIEUTENANT GOVERNOR

MAY 29, 1990
REPUBLICAN PRIMARY FOR LIEUTENANT GOVERNOR

NOVEMBER 3, 1992
GENERAL ELECTION
UNTIED STATES HOUSE OF REPRESENTATIVES
DISTRICT 3

NOVEMBER 3, 1992
GENERAL ELECTION
UNITED STATES PRESIDENT

PLAINTIFF'S EXHIBIT

SEAL OF THE SECRETARY OF STATE ARKANSAS

In Testimony Whereof, I have hereunto set my hand and affixed my official Seal. Done at office in the City of Little Rock, this 5TH *day of* OCTOBER *19* 94

Bill McCuen

Secretary of State

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REPUBLICAN PRIMARY ELECTION RESULTS 1986
LIEUTENANT GOVERNOR

COUNTY	GENE MAHLES		RALPH FORBES		TOTALS
ARKANSAS	12	63.16 %	7	36.84 %	19
ASHLEY	19	59.38 %	13	40.63 %	32
BAXTER	628	59.58 %	426	40.42 %	1054
BENTON	2682	54.62 %	2228	45.38 %	4910
BOONE	152	62.30 %	92	37.70 %	244
BRADLEY	6	60.00 %	4	40.00 %	10
CALHOUN	5	100.00 %	0	0.00 %	5
CARROLL	80	43.48 %	104	56.52 %	184
CHICOT	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
CLARK	31	68.89 %	14	31.11 %	45
CLAY	6	100.00 %	0	0.00 %	6
CLEBURNE	61	49.19 %	63	50.81 %	124
CLEVELAND	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
COLUMBIA	20	58.82 %	14	41.18 %	34
CONWAY	43	66.15 %	22	33.85 %	65
CRAIGHEAD	62	66.67 %	31	33.33 %	93
CRAWFORD	140	52.24 %	128	47.76 %	268
CRITTENDEN	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
CROSS	3	75.00 %	1	25.00 %	4
DALLAS	4	80.00 %	1	20.00 %	5
DESHA	4	66.67 %	2	33.33 %	6
DREW	6	66.67 %	3	33.33 %	9
FAULKNER	107	62.94 %	63	37.06 %	170
FRANKLIN	45	47.87 %	49	52.13 %	94
FULTON	22	50.00 %	22	50.00 %	44
GARLAND	745	62.19 %	453	37.81 %	1198
GRANT	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
GREENE	13	48.15 %	14	51.85 %	27
HEMPSTEAD	7	46.67 %	8	53.33 %	15
HOT SPRING	10	58.82 %	7	41.18 %	17
HOWARD	2	40.00 %	3	60.00 %	5
INDEPENDENCE	157	44.23 %	198	55.77 %	355
IZARD	69	49.64 %	70	50.36 %	139
JACKSON	8	53.33 %	7	46.67 %	15
JEFFERSON	47	73.44 %	17	26.56 %	64
JOHNSON	84	55.63 %	67	44.37 %	151
LAFAYETTE	3	75.00 %	1	25.00 %	4
LAWRENCE	7	41.18 %	10	58.82 %	17
LEE	5	45.45 %	6	54.55 %	11
LINCOLN	3	100.00 %	0	0.00 %	3
LITTLE RIVER	5	71.43 %	2	28.57 %	7
LOGAN	46	60.53 %	30	39.47 %	76
LONOKE	32	52.46 %	29	47.54 %	61
MADISON	143	61.51 %	102	38.49 %	265
MARION	81	49.69 %	82	50.31 %	163
MILLER	46	74.19 %	16	25.81 %	62
MISSISSIPPI	9	81.82 %	2	18.18 %	11
MONROE	13	100.00 %	0	0.00 %	13
MONTGOMERY	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
NEVADA	10	43.48 %	13	56.52 %	23
NEWTON	120	54.55 %	100	45.45 %	220
OUACHITA	15	57.69 %	11	42.31 %	26
PERRY	14	73.68 %	5	26.32 %	19
PHILLIPS	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
PIKE	8	61.54 %	5	38.46 %	13
POINSETT	12	85.71 %	2	14.29 %	14
POLK	55	47.83 %	60	52.17 %	115
POPE	74	75.51 %	24	24.49 %	98
PRAIRIE	16	61.54 %	10	38.46 %	26
PULASKI	1862	52.91 %	1657	47.09 %	3519
RANDOLPH	21	67.74 %	10	32.26 %	31
ST. FRANCIS	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
SALINE	70	48.28 %	75	51.72 %	145
SCOTT	17	40.48 %	25	59.52 %	42
SEARCY	182	42.62 %	245	57.38 %	427
SEBASTIAN	1002	43.25 %	1315	56.75 %	2317
SEVIER	12	75.00 %	4	25.00 %	16
SHARP	88	37.45 %	147	62.55 %	235
STONE	3	23.08 %	10	76.92 %	13
UNION	48	55.81 %	38	44.19 %	86
VAN BUREN	57	48.72 %	60	51.28 %	117
WASHINGTON	682	49.22 %	683	50.78 %	1345
WHITE	111	55.22 %	90	44.78 %	201
WOODRUFF	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
YELL	12	63.16 %	7	36.84 %	19
	10164	53.02 %	9007	46.98 %	19171

BEST AVAILABLE COPY

1990 PRIMARY - LT. GOVERNOR- REPUBLICAN

	RALPH P. FORBES		KENNETH "MUSKIE" HARRIS		
COUNTY	VOTES	%	VOTES	%	TOTAL VOTES
ARKANSAS	160	48.48	95	28.79	330
ASHLEY	19	38.78	13	26.53	49
BAXTER	1,195	55.27	652	30.16	2,162
BENTON	4,118	60.22	1,698	24.83	6,838
BOONE	495	55.37	284	31.77	894
BRADLEY	25	40.98	24	39.34	61
CALHOUN	12	36.36	15	45.45	33
CARROLL	211	54.81	113	29.35	385
CHICOT	32	40.51	30	37.97	79
CLARK	143	52.19	86	31.39	274
CLAY	28	57.14	12	24.49	49
CLEBURNE	330	56.70	169	29.04	582
CLEVELAND	22	48.89	16	35.56	45
COLUMBIA	374	49.73	223	29.65	752
CONWAY	100	42.74	91	38.89	234
CRAIGHEAD	292	60.08	148	30.45	486
CRAWFORD	357	55.78	190	29.69	640
CRITTENDEN	81	50.94	64	40.25	159
CROSS	31	58.49	16	30.19	53
DALLAS	26	68.42	7	18.42	38
DESHA	34	41.46	24	29.27	82
DREW	72	45.86	41	26.11	157
FAULKNER	841	41.12	619	30.27	2,045
FRANKLIN	93	50.27	59	31.89	185
FULTON	33	66.00	9	18.00	50
GARLAND	2,112	50.41	1,302	31.07	4,190
GRANT	91	47.89	74	38.95	190
GREENE	64	60.38	29	27.36	106
HEMPSTEAD	86	47.78	62	34.44	180
HOT SPRING	148	51.57	86	29.97	287
HOWARD	34	47.89	27	38.03	71
INDEPENDENCE	184	52.57	116	33.14	350
IZARD	102	56.64	77	26.92	286
JACKSON	101	48.56	77	37.02	208
JEFFERSON	674	52.49	382	29.75	1,284
JOHNSON	264	51.66	158	30.92	511
LAFAYETTE	28	71.79	4	10.26	39
LAWRENCE	48	54.55	35	39.77	88
LEE	7	63.64	3	27.27	11
LINCOLN	24	55.81	12	27.91	43
LITTLE RIVER	6	54.55	3	27.27	11
LOGAN	208	58.92	105	29.75	353
LONOKE	592	50.68	370	31.68	1,168
MADISON	282	63.09	110	24.61	447
MARION	277	50.92	188	34.56	544
MILLER	239	50.10	102	21.38	477
MISSISSIPPI	83	61.03	34	25.00	136
MONROE	363	54.50	185	27.78	666
MONTGOMERY	133	63.94	49	23.56	208
NEVADA	15	45.45	15	45.45	33
NEWTON	235	71.21	60	18.18	330
OUACHITA	156	55.12	74	26.15	283
PERRY	74	40.88	59	32.60	181
PHILLIPS	197	58.98	77	23.05	334
PIKE	85	52.15	48	29.45	163
POINSETT	13	32.50	24	60.00	40
POLK	168	57.73	75	25.77	291
POPE	577	41.51	533	38.35	1,390
PRAIRIE	103	41.70	97	39.27	247
PULASKI	7,364	33.50	10,472	47.64	21,982
RANDOLPH	24	35.29	39	57.35	68
SALINE	1,551	44.47	1,294	37.10	3,488
SCOTT	23	63.89	8	22.22	36
SEARCY	653	61.78	282	26.68	1,057
SEBASTIAN	2,669	55.18	1,331	27.52	4,837
SEVIER	59	41.55	52	36.62	142
SHARP	236	61.78	98	25.65	382
ST. FRANCIS	21	55.26	12	31.58	38
STONE	53	63.10	11	13.10	84
UNION	256	42.45	167	27.69	603
VAN BUREN	261	52.83	160	32.39	494
WASHINGTON	2,040	54.57	1,067	28.54	3,738
WHITE	907	47.34	622	32.46	1,916
WOODRUFF	8	61.54	1	7.69	13
YELL	98	51.85	66	34.92	189
COUNTIES: 75					
TOTAL:	33,180		25,032		70,775 *
AVERAGE:		46.88		35.37	

* TOTAL AS CERTIFIED BY THE REPUBLICAN PARTY
SECRETARY OF STATE CALCULATED TOTAL 70,875

1992 ARKANSAS GENERAL ELECTION - U.S. REPRESENTATIVE 3RD DISTRICT

COUNTY	JOHN VANWINKLE (D) VOTES	%	TIM HUTCHINSON (R) VOTES	%	TOTAL VOTES
BAXTER	6,504	47.65	6,416	47.00	13,650
BENTON	16,131	37.22	26,101	60.23	43,337
BOONE	6,120	46.12	6,793	51.19	13,271
CARROLL	4,247	48.56	4,218	48.23	8,746
CRAWFORD	7,419	46.83	7,968	50.29	15,843
FRANKLIN	3,956	58.91	2,637	39.27	6,715
JOHNSON	4,322	56.79	3,103	40.77	7,611
LOGAN	4,381	52.56	3,732	44.77	8,336
MADISON	2,815	53.32	2,372	44.93	5,279
MARION	2,623	49.05	2,410	45.06	5,348
NEWTON	2,014	51.57	1,760	45.07	3,905
POLK	3,761	52.47	3,206	44.73	7,168
POPE	8,954	48.60	9,021	48.96	18,425
SCOTT	2,645	57.46	1,865	40.52	4,603
SEBASTIAN	18,740	47.13	20,225	50.86	39,764
WASHINGTON	23,143	48.73	23,468	49.41	47,493
COUNTIES: 16					
TOTAL:	117,775		125,295		249,494
AVERAGE:		47.20		50.22	

COUNTY	RALPH FORBES (I) VOTES	%	REX PETTY (W) VOTES	%	TOTAL VOTES
BAXTER	730	5.35	0	0.00	13,650
BENTON	1,105	2.55	0	0.00	43,337
BOONE	358	2.70	0	0.00	13,271
CARROLL	281	3.21	0	0.00	8,746
CRAWFORD	456	2.88	0	0.00	15,843
FRANKLIN	122	1.82	0	0.00	6,715
JOHNSON	186	2.44	0	0.00	7,611
LOGAN	211	2.53	12	0.14	8,336
MADISON	92	1.74	0	0.00	5,279
MARION	315	5.89	0	0.00	5,348
NEWTON	131	3.35	0	0.00	3,905
POLK	201	2.80	0	0.00	7,168
POPE	450	2.44	0	0.00	18,425
SCOTT	93	2.02	0	0.00	4,603
SEBASTIAN	799	2.01	0	0.00	39,764
WASHINGTON	799	1.68	83	0.17	47,493
COUNTIES: 16					
TOTAL:	6,329		95		249,494
AVERAGE:		2.54		0.04	

1992 ARKANSAS GENERAL ELECTION - U. S. PRESIDENT

	JOHN HAGELIN (G)		ROSS PEROT (G)		
COUNTY	VOTES	%	VOTES	%	TOTAL VOTES
ARKANSAS	6	0.08	639	8.01	7,980
ASHLEY	6	0.06	931	9.73	9,567
BAXTER	15	0.10	2,938	18.68	15,732
BENTON	21	0.05	6,128	14.16	43,279
BOONE	13	0.09	2,079	14.40	14,437
BRADLEY	2	0.04	391	8.08	4,837
CALHOUN	2	0.07	257	9.51	2,702
CARROLL	10	0.11	1,500	16.94	8,857
CHICOT	0	0.00	347	6.81	5,099
CLARK	3	0.03	714	8.00	8,922
CLAY	4	0.06	568	8.02	7,080
CLEBURNE	10	0.10	1,263	12.66	9,980
CLEVELAND	11	0.33	337	9.98	3,378
COLUMBIA	13	0.13	1,090	11.10	9,819
CONWAY	8	0.09	803	9.47	8,481
CRAIGHEAD	10	0.04	2,274	8.88	25,596
CRAWFORD	30	0.19	2,442	15.11	16,165
CRITTENDEN	41	0.24	848	4.96	17,108
CROSS	8	0.11	602	8.62	6,986
DALLAS	3	0.08	345	8.79	3,925
DESHA	9	0.16	392	6.97	5,621
DREW	2	0.03	596	9.46	6,298
FAULKNER	14	0.06	2,437	9.66	25,215
FRANKLIN	8	0.12	987	14.65	6,736
FULTON	8	0.17	631	13.32	4,736
GARLAND	67	0.19	3,475	9.65	35,995
GRANT	2	0.03	702	11.33	6,198
GREENE	13	0.11	1,213	9.84	12,322
HEMPSTEAD	4	0.04	1,022	11.45	8,922
HOT SPRING	9	0.08	1,209	11.39	10,616
HOWARD	3	0.06	466	9.37	4,975
INDEPENDENCE	6	0.05	1,444	11.25	12,840
IZARD	5	0.09	606	10.84	5,588
JACKSON	11	0.15	673	8.94	7,524
JEFFERSON	18	0.06	2,067	6.52	31,692
JOHNSON	4	0.05	1,013	13.37	7,578
LAFAYETTE	2	0.05	504	12.67	3,979
LAWRENCE	4	0.06	636	9.18	6,929
LEE	4	0.08	308	6.08	5,066
LINCOLN	2	0.05	390	8.97	4,347
LITTLE RIVER	3	0.05	890	15.56	5,718
LOGAN	5	0.06	1,220	14.04	8,687
LONOKE	4	0.03	1,554	9.82	15,824
MADISON	3	0.06	598	11.33	5,277
MARION	5	0.08	1,327	21.25	6,245
MILLER	2	0.01	2,249	15.38	14,623
MISSISSIPPI	6	0.04	981	6.15	15,962
MONROE	2	0.05	355	8.31	4,272
MONTGOMERY	4	0.11	576	15.52	3,712
NEVADA	7	0.18	455	11.52	3,948
NEWTON	12	0.29	608	14.67	4,144
OUACHITA	6	0.05	1,238	9.97	12,415
PERRY	1	0.03	412	11.76	3,504
PHILLIPS	3	0.03	634	6.45	9,837
PIKE	2	0.05	472	11.15	4,232
POINSETT	6	0.07	761	8.88	8,571
POLK	11	0.15	1,225	16.97	7,217
POPE	11	0.06	1,989	11.14	17,862
PRAIRIE	0	0.00	434	10.97	3,956
PULASKI	74	0.05	8,751	6.39	136,957
RANDOLPH	7	0.11	578	9.15	6,314
SALINE	14	0.05	2,751	10.72	25,661
SCOTT	6	0.13	610	13.37	4,562
SEARCY	4	0.10	503	12.63	3,984
SEBASTIAN	13	0.03	6,023	15.19	39,659
SEVIER	8	0.16	643	12.83	5,011
SHARP	7	0.10	921	12.80	7,196
ST. FRANCIS	8	0.08	766	7.20	10,635
STONE	8	0.16	697	13.83	5,039
UNION	21	0.11	1,919	10.33	18,580
VAN BUREN	7	0.10	888	12.06	7,361
WASHINGTON	28	0.06	5,304	11.08	47,880
WHITE	46	0.21	2,366	10.97	21,563
WOODRUFF	2	0.06	227	6.49	3,495
YELL	7	0.09	940	12.30	7,643
COUNTIES: 75					
TOTAL:	764		99,132		950,653
AVERAGE:		0.08		10.43	

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★ Do You Know Your Candidates? ★

Get Better Acquainted With the Candidates and the Issues.

Democrat John VanWinkle of Fort Smith and Republican Tim Hutchinson of Bentonville debate the issues as they campaign for the Third Congressional District seat.

Live tonight at 7.

AETN Where Learning Never Ends

ARKANSAS
DEMOCRAT GAZETTE
OCT. 22, 1992

Thornton

• Continued from Page 1A

year. He said he might seek the Senate seat being given up by Sen. David Pryor, D-Ark. But most political analysts think it will take more than $2 million to mount a winning campaign. And they doubt that Thornton wants to take on such a fund-raising burden in the waning years of his political career, much less be the target of attacks in what promises to be a rough-and-tumble campaign for the Democratic nomination and against a Republican nominee.

It is more likely, the congressman's friends say, that Thornton will run for chief justice of the Arkansas Supreme Court. That job is being given up by Jack Holt Jr. Whomever Gov. Jim Guy Tucker appoints to fill the position through the end of 1996 will be ineligible to run for a full term.

Thornton has built one of the state's most impressive resumes: graduate of Yale University; Arkansas' attorney general in 1971-72; member of Congress from the 4th District from 1973-78; head of the Joint Educational Consortium at Arkadelphia in 1979; president of Arkansas State University at Jonesboro from 1980-84; president of the University of Arkansas System from 1984-89; member of Congress from the 2nd District since 1991.

"Ray is sort of like George Bush when it comes to being a collector of titles," one observer of Arkansas politics said last week. "Chief justice of the Arkansas Supreme Court would be a nice title for him to end with."

It would not be unprecedented for a member of Congress to wind up on his state's highest court. By the same token, former judges sometimes have taken great pride in being referred to as "judge" even after coming to Congress. One example is Sen. Howell Heflin, D-Ala., who served from 1971-76 as chief justice of the Alabama Supreme Court. Heflin prefers "Judge Heflin" to "Senator Heflin."

For now, Thornton is being coy. He gives few clues as to whether he wants to be "Sen. Thornton," "Judge Thornton" or out of politics entirely.

When he ran unsuccessfully for the Senate in 1978 — finishing third in the Democratic primary behind then-Gov. Pryor and then-2nd District Rep. Tucker — Thornton used the slogan, "I Trust Ray."

He has attempted to build on that reputation through the years. Thornton seemed genuinely embarrassed in 1991 when it was revealed that he had one overdraft on the House bank — for $18. Never mind that the person who ranked first on the overdraft list was an Arkansan, former Rep. Tommy Robinson. Never mind that two other House members from Arkansas, Beryl Anthony Jr. and Bill Alexander, ranked among the top 25 congressmen in the number of checks bounced.

On airline flights to and from Washington, Thornton has been known to spot constituents and explain to them that the taxpayers weren't footing the bill for his first-class seat. He has gone to great lengths to explain that he received a free upgrade for the number of miles traveled.

In an age of flash — an era of news conferences and press releases — it is questionable if a man who rarely holds news conferences, doesn't often grant interviews and sends out few press releases would want to be part of one of the nation's highest-profile Senate races.

"Maybe I need to go back to being Cowboy Ray Thornton," the congressman said during a recent interview in his Capitol Hill office.

Thornton had returned from military service in Korea in 1954 and entered law school at the University of Arkansas at Fayetteville. He decided to run for the presidency of the Student Government Association.

"I pulled my guitar out and began picking and singing all over campus," he said. "We attracted good crowds wherever we went, and I won by an almost 2-to-1 margin. I have not played my guitar in a campaign since then. But if politics keep changing, I might have to."

* * *

Certainly, Thornton is not known as an entertainer.

"I do my work without hype," he said.

He has chosen to ign
ponents, a strategy
worked the past three

When Thornton dec
turn to politics in 19
dozen years in academ
pended on that image
of integrity. Tucker seri
sidered running that ye
old 2nd District seat, w
being given up by Robi

Robinson, the merc
mer Pulaski County sh
had switched from th
cratic Party to the GOI
1989, conducted an uns
1990 campaign for the
bernatorial nomination.

When Tucker decide
for governor rather than
(he later dropped out and
the lieutenant governor's
left Thornton without a
challenger. Due to Thornt
id reputation and the
available from his billion
cles — W.R. "Witt" a
Stephens — Republican
hard time recruiting a c
for the open seat.

State Rep. Ron Fuller
Rock entered the race.
dropped out when contr
failed to materialize. Fin
tional Republican Congr
Committee and Arkansas
lican Party officials conv
freshman state represent
millionaire Little Rock b
man Jim Keet — to battle
ton.

Thornton refused to
Keet, claiming that "the
campaign is a debate." In
rarely mentioned his opp
name. The Democrat won
percent of the vote.

In 1992, Thornton wa
lenged by an unknown R
can from Benton, Dennis
who spent just $6,212. T
cumbent was re-elected
percent of the vote.

Last year, the going wa
tougher. Thornton had
the senior member of the
sas House delegation fo
the 1992 retirement of Rep
Rep. John Paul Hammer
and the 1992 Democratic p
defeats of Alexander and
ny. Again, no Democra
against him. Again, Repul
were unable to attract an
nent who could raise mon

But a feisty former radi
show host, Bill Powell of

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Little Rock, rode the GOP tide and wound up with 43 percent of the vote. Thornton claimed his 57 percent performance did not concern him even though his opponent was underfinanced and unknown. He noted the large number of Democratic congressmen who did not return at all for the 104th Congress.

Others, however, perceived it as a sign of vulnerability and began to make plans to challenge Thornton in 1996.

"The problem is you can never prevent someone from tossing out all kinds of charges against you," Thornton said. "My record speaks for itself. Had we debated, it would have been about me rather than the issues. People already know my record."

Thornton said he was advised last fall to "go negative and take him out. But that's not my style. I was very gratified with 57 percent."

He insisted that it's too early to announce what, if any, office he will seek next year. Yet he admitted that it won't be an advantage to run as a congressional incumbent given the current political atmosphere.

Why the cynicism on the part of voters?

Thornton has a theory: "During the 1980s, Republicans were in control of the White House and Democrats mostly were in control of Congress. Members of Congress spent their time bashing the executive branch. At the same time, Republican presidents ran against Congress. People lost confidence in both branches."

All the while, Thornton said, the Washington press corps focused on the negative.

"I understand the dynamics," he said. "When there's a fight going on, the press will show up. The fights get all the ink, and people get the idea that government is not working. Those stories, though, ignore the many parts of government that *are* working."

* * *

Thornton has known President Clinton since Clinton began his political career in Arkansas with an unsuccessful race against Hammerschmidt in 1974. But in the months since Clinton took office in January 1993, the congressman has kept his distance from the administration.

Thornton's most notable floor vote came in August 1993 when he waited until the last moment to vote against Clinton's five-year budget plan. The bill passed by only one vote.

Thornton said he opposed a gasoline tax increase in the measure and had notified the White House of his opposition well in advance of the vote. But White House officials said privately that Thornton had assured the president he would back the plan if his support was needed for passage.

With his "no" vote, Thornton angered both sides. Clinton supporters were mad that he did not stick with the president from his home state on the most important vote up to that point in the administration. Those opposed to the president, meanwhile, said that if Thornton were truly opposed to the budget package, he should have spoken out in advance and not waited until the clock had run out to vote.

Thornton later supported Clinton on two major trade accords, the North American Free Trade Agreement and the General Agreement on Tariffs and Trade.

For much of his first two terms from the 2nd District, Thornton promoted his Marshall Plan for America, calling for an investment of 2 percent of the gross national product (more than $100 billion) annually in rebuilding the nation's infrastructure and economy. He also maintained an intense interest in scientific and technological issues.

This year, Thornton has had to adjust to being a member of the minority. While careful to note that he agrees with the need for spending cuts, he continues to push for an "investment in the future."

"As part of the budget process, we ought to make a distinction between money needed for day-to-day operations and money invested in the future," Thornton said. "The day-to-day operations budget should be balanced."

As examples of past "investments in the future," he mentioned the GI Bill and the interstate highway system.

Thornton is proud that he retained his seat on the House Appropriations Committee following the Republican takeover, noting that he is the "only Democratic member of Congress elected in 1990 or later who is on one of the exclusive committees. People respect my committee work. Because of that, I was a survivor."

He said he can still be "effective in representing my constituents" as a minority member, listing Hammerschmidt as an example of a congressman who was able to get things accomplished for constituents in the minority "without being flashy."

Thornton supported parts of the GOP's Contract With America but he said a mistake was made in rushing through a crowded agenda "in a short period of time without the benefit of proper hearings."

"The reason we have hearings is to avoid mistakes," he said. "The speed with which we have done things this year has been the biggest flaw. I also have problems with the word 'contract.' I term it an 'agenda.' The only contract any member of the House has is with the 600,000 people who allow him to serve."

Such proclamations by Thornton can sound flowery. They're the words of an old-fashioned politician, not a sound-bite wizard of the 1990s. Thornton thinks there's still a place for his deliberate style.

"When you have a tragedy like we had in Oklahoma City last month, it gets you back to your roots," he said. "I think the American people are hungry for cooler heads and less heated rhetoric."

He said he is "old enough to remember when the Ku Klux Klan was a force" and thus not alarmed by the current focus on private militias.

"The right of people to express their opinions must be protected," Thornton said. "Our job is to stop those who want to move from thoughts to acts of violence."

As he continues his work on the Appropriations Committee and for the folks back home, the question among political animals in Arkansas is whether Thornton will run for the Supreme Court, the Senate or call it a career.

As summer approaches, the man who has been a part of the state's establishment for a quarter of a century is giving clues as to his intentions

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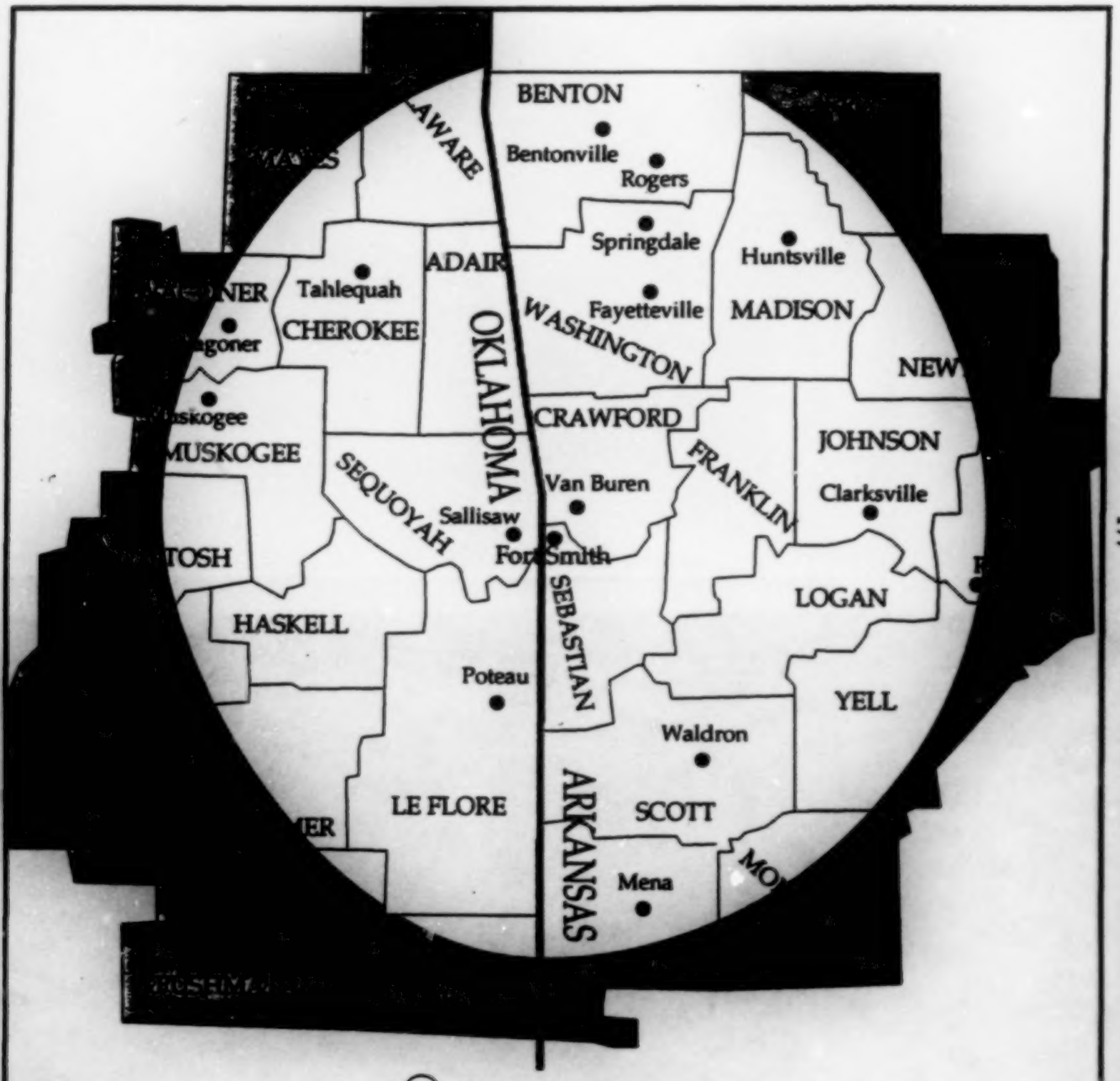
FORT SMITH ◀▶ FAYETTEVILLE

Coverage Map



PLAINTIFFS EXHIBIT 25

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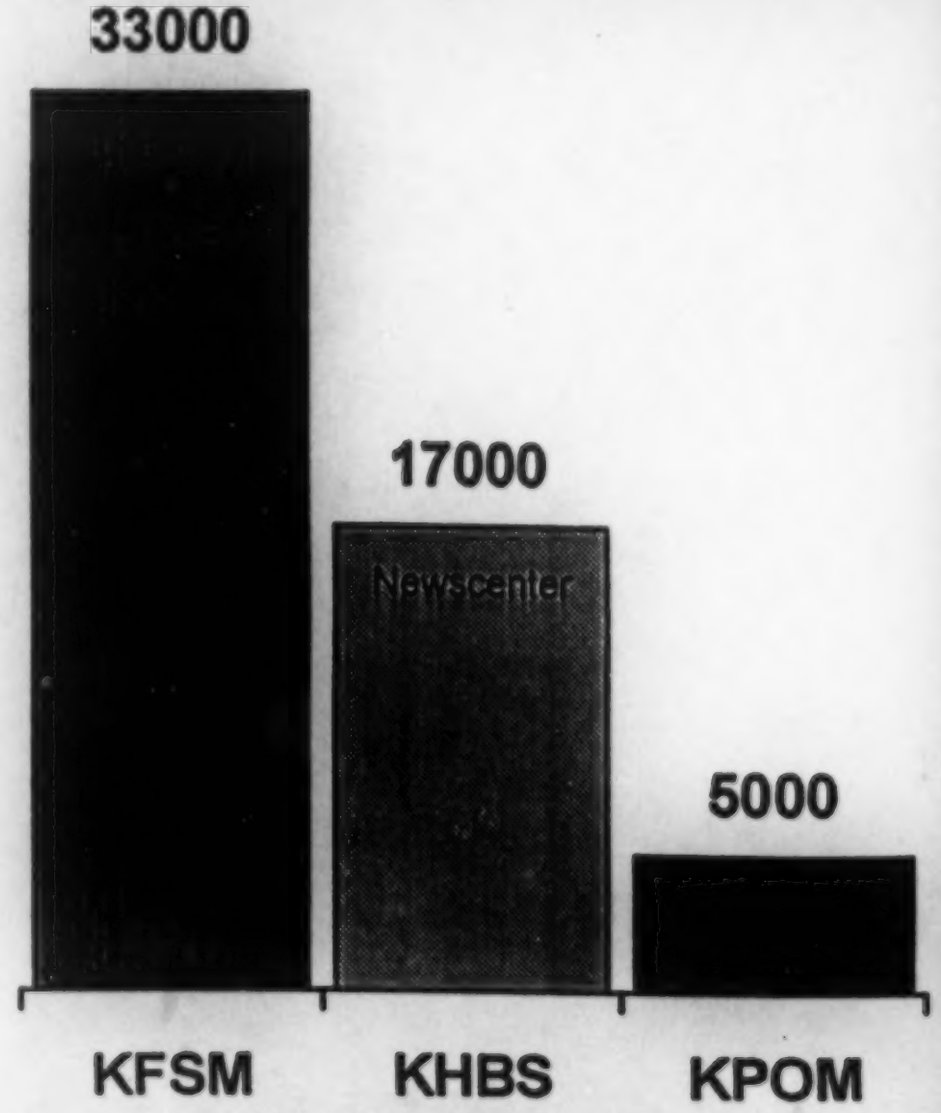
(501) 783-3131 • Box 369 • Fort Smith, Arkansas 72902

5 KFSM

LOCAL NEWS 5 - 5:30 p.m.

KFSM TV5 delivers more *Total Adults* in the Fort Smith AdZone than KHBS and KPOM combined.

Fort Smith AdZone: Crawford, Franklin Logan, Scott, Sebastian, LeFlore and Sequoyah Counties.



Source: Nielsen November 1994

PLAINTIFFS EXHIBIT
26

Where Local News Comes First!

Organizational Structure of AETC and AETN

As of October, 1992

The Governor
(Bill Clinton)

|

Eight Members of the Arkansas ETV Commission
(Appointed by the Governor)

|

Susan Howarth
Executive Director
(Employed by Commission)

|

Larry Foley
Associate Director

Carole Adornetto
Production Director

|

Amy Oliver
Production Manager
(Employee of AETN Foundation)

DEFENDANT'S EXHIBIT 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2722WAFS

Ralph P. Forbes *
*
Appellant, *
*
v. *
*
The Arkansas Education *
Television Commission, et al. *
*
Appellees. *

Filed: November 20, 1995

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS FORTH
SMITH DIVISION

BRIEF FOR APPELLEES

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SUMMARY OF THE CASE; REQUEST FOR ORAL ARGUMENT

In October, 1992, the Arkansas Educational Television Network ("AETN") broadcast a debate between the major party candidates for the Third District U.S. House seat in Arkansas. Ralph Forbes, a fringe candidate, was not invited to participate. In Forbes v. Arkansas Educ. Television Communication Network Found., 22 F.3d 1423 (8th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 500 (1994), cert. denied, 115 S. Ct. 1962 (1995), this Court ordered a trial of Forbes' First Amendment claim against AETN. A jury found for AETN, and Forbes now appeals.

This appeal reopens the issue of whether, and under what circumstances, a state-entity public broadcast licensee's programming judgments are protected under the First Amendment. AETN contends that this Court may not delve into its editorial decisions – even if AETN denied Forbes a forum for his views – unless AETN's editorial processes were tainted by political interference. (The jury found that no political interference occurred.) AETN's defense runs counter to this Court's en banc holding that AETN "must provide a rational and viewpoint-neutral justification" for its editorial decisions. (The en banc holding also is counter to decisions of other circuits.)

This case involves complicated Communications Act and First Amendment analysis. AETN has suggested consideration en banc, and believes that oral argument of at least 30 minutes per side is necessary.

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Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788 (1985) 28, 32

Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993) 47, 48

David v. Merrill Lynch, Pierce, Fenner & Smith, 906 F.2d 906 F.2d 1206 (8th Cir. 1990) 41, 42

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FCC v. League of Women Voters, 468 U.S. 364 (1984) 18, 19, 21, 31, 38

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Gordon v. National Broadcasting Co., 287 F. Supp. 452 (S.D.N.Y. 1968) 24

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Martin v. Gulf States Utilities Co., 344 F.2d 34 (5th Cir. 1965) 43

McDonnell v. Timmerman, 269 F.2d 54 (8th Cir. 1959) 41

Muir v. Alabama Education Television Commission, 688 F.2d 1033 (5th Cir. 1982), cert. denied, 460 U.S. 1023 (1983) 19, 20, 32, 34, 36, 38

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Constitutional Party and Frank W. Gaydosh, 14 F.C.C.2d 255 rev. denied, 14 F.C.C.2d 861 (1968) 23, 29, 38

Codification of the Federal Communications Commission's Political Programming Policies, 7 F.C.C. Rcd 678 (1991), modified, 7 F.C.C. Rcd 4611 (1992) 22

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Under the First Amendment and the Communications Act, and absent political interference from the state, does a state-entity public broadcast licensee have the same editorial prerogatives as non-state-entity public broadcast licensees and commercial licensees, so that its editorial processes, as carried out by the professional editors charged with making day-to-day programming decisions, are protected from oversight by the judiciary?

2. Should this Court modify its decision in Forbes v. Arkansas Educ. Television Communication Network Found., 22 F.3d 1423, 1430 (8th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 500 (1994), cert. denied, 115 S. Ct. 1962 (1995), holding that a state-entity public broadcast licensee "must provide a rational and viewpoint-neutral justification" for editorial decisions affecting the broadcast of a political debate, when no political interference by the state is found?

3. Did the District Court correctly instruct the jury to find whether political pressure influenced the Arkansas Educational Television Network's decision not to invite a candidate to a broadcast debate?

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND PROCEDURAL HISTORY

In October 1992, the Arkansas Educational Television Commission ("AETC" or the "Commission") arranged to conduct and broadcast a debate between the Republican and Democratic candidates for the office of United States Representative for the Third District of Arkansas. By letter dated August 24, 1992 to AETC's Executive Director Susan Howarth, Ralph P. Forbes notified AETC that he was an independent candidate for U.S. Representative from the Third District of Arkansas and requested to be included on equal terms in the debate between his opponents. Forbes Appendix ("F.App.") A3(a). On September 4, 1992, Howarth responded by letter stating that, under Section 315(a) of the Communications Act, 47 U.S.C. §315(a), as interpreted by the FCC and the courts, debates were exempt from equal opportunities, and that AETC had made a bona fide journalistic judgment that its viewers would be best served by limiting the debate to nominees of the two major parties. AETN Tr. Exh. 12.

On October 19, 1992, three days before the debate, Forbes sued AETC, its members, its Executive Director and others in the United States District Court for the Western District of Arkansas. He alleged that, because he was qualified for the ballot as an independent candidate, he had a right to be included in the debate. Forbes alleged that AETC's decision not to invite him to the debate violated the Civil Rights Act, 42 U.S.C. §1981 et seq., and his First Amendment rights. He sought declaratory and injunctive relief and compensatory and punitive damages.

Forbes' motion for a preliminary injunction to mandate his inclusion in the debate was denied by the District Court on October 20, 1992. On October 21, 1992 and October 22, 1992, respectively, the Chief Judge and a panel of this Court denied Forbes' request for an injunction pending appeal. The debate was broadcast without Forbes' participation on October 22, 1992.

One week after the election, the AETN Defendants filed a motion to dismiss the complaint under Rule 12(b)(6), Fed.R.Civ. P.12(b)(6). The District Court granted the AETN Defendants' motion and dismissed the complaint on December 16, 1992.

A panel of this Court denied Forbes' request for rehearing on the issue of preliminary relief on December 22, 1992. On April 28, 1994, this Court, en banc, affirmed in part and reversed in part the District Court's decision granting the AETN Defendants' motion to dismiss. Forbes v. Arkansas Educ. Television Communication Network Found., 22 F.3d 1423 (8th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 500 (1994), cert. denied, 115 S. Ct. 1962 (1995). The Court reversed concerning Forbes' First Amendment claim, holding that, "Forbes did allege a First Amendment violation well enough to survive a motion to dismiss." Id. at 1428.

On September 16, 1994, the AETN Defendants filed with the United States Supreme Court a petition for a writ of certiorari, which was denied on November 7, 1994. On September 19, 1994, Forbes filed a petition for a writ of certiorari, which was denied on May 15, 1995.

Trial began on Forbes' First Amendment claim on June 5, 1995. On June 7, 1995, the jury returned a verdict in favor of the AETN Defendants. Responding to a special verdict form, the jury found that (1) AETN's decision not to invite Forbes to the debate was not influenced in any way by political pressure, and (2) the decision was not made because of objections or opposition to his views. The District Court entered judgment in favor of the AETN Defendants on June 7, 1995.

Forbes filed a notice of appeal. On August 4, 1995, the AETN Defendants suggested that this Court schedule an initial hearing en banc. By Order dated August 9, 1995, the Court referred the suggestion to the panel hearing this case. The suggestion is pending.

II. STATEMENT OF FACTS

A. The Arkansas Educational Television Commission and The Arkansas Educational Television Network

The Arkansas Educational Television Commission is an agency of the State of Arkansas, organized for the purpose of making the benefits of educational television available to the people of Arkansas. Ark. Code Ann. §§ 6-3-101, 6-3-105(a) (Michie 1994). AETC has eight members appointed by the Governor of Arkansas with the advice and consent of the state Senate. Ark. Code Ann. § 6-3-102(a)(1), (b)(1). The members may not hold any other state or federal office, or hold employment paid in whole or part by funds derived from tax sources, except for educators in the state's public schools or institutions of higher learning. Ark. Code Ann. § 6-3-102(a)(3). The members serve eight-year terms and may be removed only for good cause. Ark. Code Ann. §§ 6-3-102(b)(1), 25-16-804(b)(1).

AETC's Executive Director is defendant Susan Howarth. Tr. Trans. 178 (S. Howarth)[1/]. As Executive Director, Ms. Howarth is an employee of the Commission and the executive in overall charge of the Arkansas Educational Television Network ("AETN" or the "Network"). Tr. Trans. 184 (S. Howarth). The Network's headquarters is in Conway, Arkansas, where network programming originates. Tr. Trans. 182 (S. Howarth). The Network also consists of the following five stations: KETS, Little Rock; KEMV, Mountain View; KETG, Arkadelphia; KAFT, Fayetteville; and KTEJ, Jonesboro. See Tr. Trans. 179, 182 (S. Howarth). All five stations are noncommercial educational television stations licensed by the Federal Communications Commission (the "FCC") to AETC. Tr. Trans. 179, 183 (S. Howarth).

There is also an organization called the Arkansas Educational Telecommunications Network Foundation (the "Foundation"), a tax-

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1/ References to "Tr. Trans." refer to the transcript of the jury trial held June 5-7, 1995.

exempt entity that supports the Network. Tr. Trans. 184, 186 (S. Howarth). Ms. Howarth is also the Executive Director of the Foundation. See Tr. Trans. 184 (S. Howarth).

B. Programming Policy Statement for AETN

Although AETN is state-owned, it is organized so that its programming decisions are free from political pressure that might originate with members of the executive or legislative branches of state government. The eight members of AETC appoint an Executive Director. Ark. Code Ann. § 6-3-104. The June 1988 "Programming Policy Statement for AETN" that the Commission adopted and follows, Tr. Trans. 187, 194 (S. Howarth), declares that the Commission delegates to its Executive Director the authority to make programming decisions for the Network. AETN Appendix ("A.App.") 44 (Tab 7). In other words, the Executive Director of the Commission is the Network's "editor-in-chief." A.App. 44; Tr. Trans. 184 (S. Howarth). The Executive Director "may delegate the exercise of this authority to professional staff based on informed programming discretion. . . ." A.App. 44.

The Commission's Programming Policy Statement demonstrates that the purpose of AETN is to provide educational and other valuable programming to the people of Arkansas:

> AETN furthers the goals of a democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens/voters to make informed judgments about the issues of our time.
>
> * * *
>
> Locally-produced programs relevant and responsive to Arkansas needs, problems, issues, and concerns are a very important part of a comprehensive broadcast schedule tailored to the interests of the people of this state.

A.App. 46. The Programming Policy Statement also describes how the structure of AETN insulates the editorial decisions of AETN's professional journalists and programmers:

> AETN maintains public trust in its editorial integrity by shielding the programming process from improper political pressure or influence from program funders or other sources.
>
> AETN bases its public service programming on its value in the marketplace of ideas; not on financial considerations or commercial pressures.

A.App. 45.

C. Statement of Principles of Editorial Integrity in Public Broadcasting

The Commission also follows the "Statement of Principles of Editorial Integrity in Public Broadcasting" adopted by AETC in June 1988. Tr. Trans. 194 (S. Howarth). This document was developed at a conference "convened so that public broadcasting station managers and representatives of state licensee boards and commissions could explore the First Amendment position of public broadcasting licensees in light of past legal decisions and legislative actions." A.App. 41 (Tab 6). The conferees, including representatives of AETC, were concerned about the sensitive constitutional issues that can arise when state-owned broadcasting stations exercise their editorial discretion. They drafted the Statement of Principles of Editorial Integrity to "help to guarantee public broadcasting's editorial integrity in the future." Id. Editorial integrity in public broadcast programming is defined in the document as "the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." Id. at 34.

The Statement of Principles of Editorial Integrity declares:

> The process of developing programs . . . must be managed by the professional staff according to generally accepted broadcasting industry standards, so that the programming service is free from pressure from political or financial supporters. The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria, such as fairness, objectivity, balance and community needs; not on funding considerations.

A.App. 40. AETN, as a signatory to the Principles of Editorial Integrity, partitions its broadcasting operations so that they are editorially independent of the state's political and administrative apparatus. AETN's journalistic process is deliberately partitioned from the political and administrative processes of the state.

D. The 1992 Federal Elections

1. AETN's Decision to Produce Debates for the 1992 Federal Elections and Its Initial Planning of the Debates

In fulfillment of its purpose to provide valuable programming to the people of Arkansas about current issues, AETN produced programming to cover the 1992 federal elections. Planning began as early as May 1992, when Carole Adornetto, AETN's Production Director, instructed Amy Oliver Barnes,[2/] the Production Manager, to work with Bill Simmons, Chief of the Associated Press (the "AP") in Little Rock, to produce five election debates. Tr. Trans. 195 (S. Howarth); Tr. Trans. 292 (A. Oliver); AETN Tr. Exh. 15 (Memo. dated May 12, 1992 from Carole Adornetto to Amy Oliver). Mr. Simmons, a respected journalist, acted as a journalistic consultant to AETN. AETN worked with Mr. Simmons because he "brought so much credibility" and because "he had brought a lot to the process

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2/ Ms. Barnes worked professionally under the name Amy Oliver, and is referred to in this Brief as Ms. Oliver.

because of his -- his background and his experience." Tr. Trans. 195-96 (S. Howarth). Ms. Oliver was responsible for making a recommendation, through Ms. Adornetto, to Ms. Howarth about the conduct of the debates. Tr. Trans. 195 (S. Howarth).

AETN planned one debate between the candidates for the senatorial race in Arkansas and one between the candidates for each of the four congressional races. Each debate was to last one hour, which meant that, after introductory and closing material, only about 53 minutes remained for discussion by, and questioning of, the candidates. Tr. Trans. 200 (S. Howarth). Consistent with AETN's purpose, the debates were to give AETN's viewers the opportunity to see a detailed discussion of the issues of greatest interest to them, so that as voters they could be well-informed on election day.

2. The Certification and Campaign of Ralph Forbes for Arkansas' Third Congressional District for the United States House of Representatives

For a candidate's name to appear on the ballot, he must become certified. Ark. Code Ann. § 7-7-101. Ralph Forbes sought certification as an independent candidate for the United States House of Representatives from Arkansas' Third Congressional District in the 1992 elections. See A.App. 57. To become certified as an independent, the candidate must file petitions signed by at least three percent of the qualified electors in the district in which he is seeking office (but no more than 2,000 signatures are required). Ark. Code Ann. § 7-7-103(c)(1); see A.App. 57-58. Forbes had approximately 50 volunteers who worked "very part-time" helping him gather the required signatures. A.App. 68. Forbes testified, however, that most of his volunteers "weren't that productive." Id. Consequently, Forbes "realized it's more productive . . . to just get [the signatures] [himself] rather than try to . . . organize people to help [him]." Id. So, Forbes went out seeking signatures many times from dawn until dusk. A.App. 57. He found that it was not easy to get signatures. Id. Forbes testified that "it's difficult for [him] to walk up to a stranger and introduce [himself]." A.App. 58. After two unsuccessful attempts, Forbes finally became certified in August, 1992. A.App. 57, 68. Forbes ran against the Democratic candidate,

John VanWinkle; the Republican candidate, Tim Hutchinson; and write-in candidate, Rex Petty. Tr. Trans. 302-03 (A. Oliver); A.App. 57, 85-86.

Forbes previously ran for the school board in Pulaski County, Arkansas in 1985, but he "didn't have hardly any votes." Tr. Trans. 144 (R. Forbes); A.App. 53. In 1986, he ran in the Republican primary election for Lt. Governor of Arkansas, but he did not win that election. Tr. Trans. 144 (R. Forbes); A.App. 54. In 1986, he also ran for a seat in the United States Senate. Records in the Office of the Secretary of State show that, in the Senate election, Forbes received 52 votes, out of 695,487 votes cast, or 0.01 percent. AETN Tr. Exh. 17 (Certified Copy of Arkansas Election Results 1986) at 2; Tr. Trans. 300 (A. Oliver). He ran again in the Republican primary run-off election for Lt. Governor in 1990, and lost that election as well. Tr. Trans. 146 (R. Forbes); A.App. 55. In that election, he received only 4,431 votes out of the 31,980 votes that were cast, or 13.86 percent. AETN Tr. Exh. 18 (Arkansas Election Results 1990) at 41; Tr. Trans. 300-01 (A. Oliver). In fact, Arkansas Election Results 1990 shows that, in the 1990 Republican primary run-off election, Forbes did not even win one of the 75 counties. AETN Tr. Exh. 18 at 42; Tr. Trans. 301 (A. Oliver); A.App. 56.

Forbes himself described his 1992 campaign organization as "[b]edlam." Tr. Trans. 146-67 (R. Forbes); A.App. 67. His wife and some of his children helped with his campaign. Tr. Trans. 147 (R. Forbes); A.App. 69. Otherwise, "[a] lot of people that had volunteered just weren't there in reality. And it was like some of my other campaigns, it boiled down to a one or two man campaign towards the end." A.App. 69-70; Tr. Trans. 147 (R. Forbes). Forbes had no paid campaign staff. A.App. 75. Other than his family, he had no volunteer staff who worked full-time or near full-time. Id. Forbes said there were "some or a few" part-time workers in his campaign, but not a "substantial" number. Id.

Forbes' house was his campaign headquarters. Tr. Trans. 147 (R. Forbes); A.App. 70. He did not rent any other headquarters. A.App. 70. "[W]herever [he] was was the headquarters." Id.; see Tr. Trans. 147 (R. Forbes).

Forbes did not have a campaign bus; he traveled around the Third Congressional District by private car. A.App. 77-78. When he was in other towns, he did not stay at hotels or motels, but instead "use[d] somebody else's home or bedroom or whatever." A.App. 70.

Forbes raised less than $10,000 for his 1992 campaign, which he admitted "wasn't very much by politician standards." Tr. Trans. 148 (R. Forbes); A.App. 70; AETN Tr. Exh. 21 (Certified copy of Report of Receipts and Disbursements for Ralph Forbes). (Forbes' opponents in the 1992 election, Tim Hutchinson and John VanWinkle, raised approximately $371,000 and $430,000, respectively. AETN Tr. Exhs. 19, 20 (Certified copies of Reports of Receipts and Disbursements for Tim Hutchinson, John VanWinkle); Tr. Trans. 301-02 (A. Oliver)). Although Forbes tried to raise more money, he was not successful because "[m]any people weren't aware that [he] was running." A.App. 75.

Forbes was not well known because he did not buy enough advertisements. Tr. Trans. 148 (R. Forbes); A.App. 71-72. He did not get nearly the coverage he needed in order to attract enough votes to win. Tr. Trans. 148-49 (R. Forbes); A.App. 74.

> First of all, there wouldn't be enough people seeing the ads. And secondly, even the ones that saw them would say they saw it once and it wouldn't necessarily be enough, you know, statistically, it wouldn't be enough for that person to click and say yeah, this guy has got a chance, I will vote for him.

A.App. 74. By way of analogy, Forbes stated that he "wasn't even a flea scratching an elephant." Id.; Tr. Trans. 150 (R. Forbes).

In addition, Forbes does not remember ever speaking to any large groups during his campaign. Tr. Trans. 155 (R. Forbes); A.App. 80. He never held rallies. Tr. Trans. 155 (R. Forbes); A.App. 79. At his deposition, Forbes testified that he received only one invitation to speak at a meeting, which he declined. A.App. 76-

77. At trial, Forbes testified that he received two invitations, both of which he declined. Tr. Trans. 172-73 (R. Forbes). He recalled:

> We kept trying to find out where -- for whatever reason, I don't know the reason, but the people that were inviting my two opponents [to speak] were not inviting me. I have no way of knowing why. It's just a fact, and we kept trying to find out where they were going but we always -- it was too late to -- to meet them or become part of that.

Tr. Trans. 173 (R. Forbes); see A.App. 77.

Forbes described the press coverage his campaign received as "zilch." Tr. Trans. 154 (R. Forbes); A.App. 81. When asked whether any reporters traveled with him, Forbes responded, "Absolutely not." Tr. Trans. 153 (R. Forbes); A.App. 78.

> I was told by many people that there was a general consensus that we were nonpersons, we didn't exist, our campaign didn't exist and it was just generally agreed by everyone that no matter what I did, if I ran around in a flaming war bonnet naked jumping off towers, it would be not newsworthy. And the odd part about one thing I do recall, I think it's Osahi or however they pronounce it, it's the largest Japanese news media in the country, kept calling me, they wanted to come down and film my campaign. I had to keep telling them I am sorry, there is nothing to film.

A.App. 77; Tr. Trans. 153 (R. Forbes). Forbes testified that his opponents -- the Democratic and Republican candidates, Mr. VanWinkle and Mr. Hutchinson -- were "getting statewide coverage . . . they were getting as much coverage, perhaps, as the [sic] Governor Clinton, who was running for president." A.App. 80-81.

Forbes knew he needed a miracle in order to win the 1992 election. Tr. Trans. 162 (R. Forbes); A.App. 92. Forbes received approximately two and a half percent of the vote in the 1992 election. AETN Tr. Exh. 22 (Arkansas Election Results 1992) at 49; Tr. Trans. 303 (A. Oliver).

3. Forbes' Request to be Included in the Debate and AETN's Consideration and Disposition of the Request

On June 17, 1992, Bill Simmons of the Associated Press sent invitations to each major party candidate in the Senate and House races, inviting them to participate in AETN's televised debates. For the Third Congressional District, invitations were sent to Mr. VanWinkle, the Democratic candidate, and Mr. Hutchinson, the Republican candidate. At the time, no other qualified candidates were running for this seat. See A.App. 59-60. Exactly two months later, on August 17, 1992, Ralph Forbes qualified as a candidate. A.App. 57. By letter of August 24, 1992, Forbes asked to be included in the debate with Mr. VanWinkle and Mr. Hutchinson. AETN Tr. Exh. 11.

AETN, Mr. Simmons of the AP, considered whether to invite Forbes to the debate. The feeling of the professional staff at AETN and Mr. Simmons was that, with only 53 minutes for the actual debate, time was a precious commodity; if there were too many participants, there would not be enough time for each candidate to address issues in an in-depth, meaningful manner. They felt that the debates would not be worthwhile if the candidates had time only to make short, superficial statements about issues. They concluded that, to provide an informative debate and serve viewers best, the issues should be discussed in-depth by those candidates who had a realistic chance of winning. Tr. Trans. 198-201, 207-08 (S. Howarth); Tr. Trans. 293 (A. Oliver).

Ms. Oliver made a recommendation, through Ms. Adornetto, to Ms. Howarth about whom to invite to the debate. She conducted careful, thorough research about Forbes' campaign to determine as a practical matter, whether he had a chance to win the election. Tr. Trans. 297 (A. Oliver). Ms. Oliver used her professional journalistic

judgment in making this evaluation. She consulted Mr. Simmons and other journalists to assess how politicians and knowledgeable political observers viewed Forbes. Tr. Trans. 294-95, 296, 297-98, 298-99 (A. Oliver); Tr. Trans. 200, 202, 212-14 (S. Howarth). Mr. Simmons' professional judgment was that, in the 1992 election, Forbes had no popular support and that he should not be invited to the debate. AETN Tr. Exh. 16 (Memo. dated June 19, 1992 from A. Oliver to C. Adornetto).

Ms. Oliver also reviewed results of the 1990 Republican primary run-off election for Lt. Governor, in which Forbes did not win a single county. See Tr. Trans. 300-01; AETN Tr. Exh. 18 (Arkansas Election Results 1990) at 42; AETN Tr. Exh. 13 (Memo. dated Sept. 14, 1992 from A. Oliver to C. Adornetto). Moreover, she learned that Forbes raised a very small amount of money for his campaign, did not have any paid or volunteer campaign staff, and did not have campaign headquarters, other than his house. Tr. Trans. 199, 202, 212-14 (S. Howarth); AETN Tr. Exhs. 13, 14, 16. Ms. Oliver concluded that Forbes had little popular support among voters of the Third District, and that other responsible political journalists did not consider him a significant participant in the race. Tr. Trans. 296 (A. Oliver); AETN Tr. Exhs. 13, 14. Ms. Oliver judged that Forbes had no practical chance of winning the election, that is, that Forbes was not a serious candidate. AETN Tr. Exhs. 13, 14, 16. Accordingly, Ms. Oliver recommended not inviting Forbes to participate in the debate.

Ms. Adornetto and Ms. Howarth, using their professional journalistic judgment, agreed. See Tr. Trans. 298 (A. Oliver). Accepting Ms. Oliver's recommendation, Ms. Howarth decided not to invite Forbes to the debate. Id. Ms. Howarth notified Forbes of this decision in a letter dated September 4, 1992. AETN Tr. Exh. 12.

Ms. Howarth's decision not to invite Forbes to the debate was not based on Ms. Howarth's, Ms. Adornetto's, Mr. Oliver's, or Mr. Simmons' hostility toward Forbes' views or on favoritism towards the views of other candidates. In fact, the decision was not in any way based on Forbes' views. Tr. Trans. 210 (S. Howarth); Tr. Trans. 295-96, 345 (A. Oliver). And it was not the result of political or other

pressure. Tr. Trans. 209-10 (S. Howarth); Tr. Trans. 304 (A. Oliver). Rather, it was a professional decision of the kind that journalists, like those at AETN and the AP, routinely make.

4. Forbes' Knowledge of AETN's Decision-Making Process Concerning Whether to Invite Him to the Debate

Forbes knew nothing about the analytical process that led Ms. Howarth not to invite him to the debate. At trial, he proffered no evidence about AETN's decision process, and testified that he has no direct knowledge of how decisions were made concerning whom to invite to the debate. Tr. Trans. 165 (R. Forbes); A.App. 66, 88.

In addition, Forbes has no knowledge of any political pressure being applied to anyone at AETN concerning the debate. Tr. Trans. 165-66 (R. Forbes); A.App. 84; A.App. 64-65, 82-83, 86-87, 93,94. Forbes has no knowledge of any irregularities in AETN's decision-making process concerning the debate. A.App. 88. While he is unhappy with AETN's decision, he knows of nothing that happened, for example, the application of political pressure, that would cause him to describe the decision-making process as tainted in any way. Tr. Trans. 166-67 (R. Forbes); A.App. 89.

SUMMARY OF ARGUMENT

Public broadcasters, including state entities such as AETN, are licensed under the Communications Act, which requires all licensees to have the capacity to exercise unfettered editorial discretion. Under decisions of the U.S. Supreme Court and other Courts of Appeals, a state-entity public broadcaster's editorial decisions are protected from judicial second-guessing under the First Amendment. Only in the event of a state's political interference with the programming judgments of a licensee's professional staff (or a state policy or practice that pervasively curtails access to ideas, see, e.g., Chandler v. Georgia Pub. Telecommunications Comm'n, 917 F.2d 486, 489 (11th Cir. 1990), cert. denied, 112 S. Ct. 71 (1991)), would a state-entity licensee forfeit First Amendment protection for its programming decisions.

This Court's earlier en banc decision in this case required AETN to "provide a rational and viewpoint-neutral justification" for its decision not to invite Forbes to the debate. Forbes, 22 F.3d at 1430. If AETN must justify this editorial decision, then it can be haled into court to prove the basis for any editorial decision with which a disgruntled viewer disagrees. This is an intolerable burden on AETN's editorial prerogatives, and is inconsistent with the deference to public broadcasters' editorial discretion that is mandated by precedent.

The District Court properly instructed the jury and properly gave the jury a special verdict interrogatory on the question of whether political pressure affected AETN's editorial decision not to invite Forbes to the debate. Further, the District Court's evidentiary rulings are supported by case law. The decision below should be affirmed on the ground that AETN's content-based decision not to invite Forbes is protected by the First Amendment.

ARGUMENT

I. AETN'S DECISION TO HOLD A POLITICAL DEBATE WITHOUT INVITING A FRINGE CANDIDATE IS AN EXERCISE OF EDITORIAL DISCRETION PROTECTED BY THE FIRST AMENDMENT, AND THIS COURT SHOULD ADOPT A TEST TO PROTECT STATE-ENTITY PROGRAMMING JUDGMENTS THAT ARE NOT THE PRODUCT OF POLITICAL INTERFERENCE BY THE STATE.

A. The Statutory Framework

1. The History of Noncommercial, Educational Broadcasting

"The history of noncommercial, educational broadcasting in the United States is as old as broadcasting itself." FCC v. League of Women Voters, 468 U.S. 364, 367 (1984). The Radio Act of 1927 and the Communications Act of 1934 made no special provisions for noncommercial, educational broadcasting stations. Id. Thus, they

are subject to the same licensing requirements as commercial broadcasting stations. Id. In 1939 and 1952, the FCC reserved certain radio frequencies and television allocations for educational use. Id. In 1962, for the first time, Congress provided for direct financial assistance to noncommercial, educational broadcasting. Id. In 1967, Congress enacted the Public Broadcasting Act of 1967, establishing the framework for public broadcasting as we know it today. Id. at 368. This legislation created the Corporation for Public Broadcasting ("CPB")to fund noncommercial, educational broadcasting. Id. Grants from CPB account for only a portion of total support. Id. at 390 n.19. "The vast majority of financial support comes instead from state and local governments, as well as a wide variety of private sources. . . ." Id. At least two-thirds of public television stations are licensed to states or state-related entities. Id. at 393 n.22.

2. The Communications Act Requires that AETC, as the Licensee of AETN, Exercise Unfettered Editorial Discretion Over Programming

In enacting the Communications Act, "the intention of Congress [was] to maintain a substantial measure of journalistic independence for the broadcast licensee." Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 116 (1973). Thus, the FCC "fulfilled its statutory obligations by promulgating regulations which view licensees as having the sole right and nondelegable responsibility to select the programs to be broadcast." Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1040 (5th Cir. 1982), cert. denied, 460 U.S. 1023 (1983).

> A basic premise of Communications policy is that a licensee is a `trustee' for the public, and that he must therefore assume the `primary duty and privilege to select the material to be broadcast to his audience. . . .' [citations omitted]. `The [Federal Communications] Commission has always regarded the maintenance of control over programming as a

> most fundamental obligation of the licensee.' [citations omitted].

Cosmopolitan Broadcasting Corp. v. FCC, 581 F.2d 917, 921 (D.C. Cir. 1978). Maintaining programming control is so important that the FCC denies license renewals when licensees fail to maintain control over programming. See, e.g., Cosmopolitan Broadcasting Corp., 59 F.C.C.2d 558 (1976), recons. denied, 61 F.C.C.2d 257 (1975), rev'd on other grounds, 581 F.2d 917 (1978).

In general, licensees of public television are subject to the same regulatory requirements as licensees of commercial television. Muir, 688 F.2d at 1040. In addition, the Public Broadcasting Act of 1967 "illustrates a Congressional desire that public broadcast licensees retain independent programming responsibility." Id. "Thus the FCC, in its demand for unfettered licensee control over programming has made no distinction between private and public licensees." Id. Accordingly, for the FCC to find "that the public interest, convenience, and necessity would be served by" AETC's remaining the licensee of its stations, see 47 U.S.C. § 309 (1988), AETC (through Ms. Howarth, its Executive Director) must be able to exercise unhindered programming discretion. This is because "certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard." Columbia Broadcasting Sys., 412 U.S. at 120.

"[N]oncommercial broadcasters, no less than their commercial counterparts, are entitled to invoke the protection of the First Amendment and to place upon the Government the burden of justifying any practice which restricts free decisionmaking." Community-Serv. Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (footnote omitted). In other words, "broadcasters are engaged in a vital and independent form of communicative activity," and state broadcast licensees are "`entitled under the First Amendment to exercise "the widest journalistic freedom consistent with their public [duties]."'" FCC v. League of Women Voters, 468 U.S. at 378 (citations omitted).

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors – newspaper or broadcast – can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.

Columbia Broadcasting Sys., 412 U.S. at 124-25.

3. AETN Was Not Required To Provide Forbes "Equal Opportunities" Under the Communications Act

Section 315(a) of the Communications Act, 47 U.S.C. § 315 (1988), requires broadcasters to afford "equal opportunities" to legally qualified opponents of candidates who "use" their facilities.[3/]

3/ 47 U.S.C. § 315 (1988) provides:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any –
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news

(continued...)

Political Primer 1984, 100 F.C.C.2d 1476, 1489-93 (1984); see also Codification of the Federal Communications Commission's Political Programming Policies, 7 FCC Rcd 678 (1991), modified, 7 FCC Rcd 4611 (1992). However, if a candidate's appearance falls within any of Section 315's four exemptions, including "on-the-spot coverage of a bona fide news event," opponents are not entitled to equal opportunities. Political Primer 1984, 100 F.C.C.2d at 1493, 1500-02.

In Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976), the Court of Appeals upheld an FCC ruling (reversing an earlier FCC opinion) that broadcast of candidates' debates was exempt from "equal opportunities" as "on-the-spot coverage." Id. at 358, 359. To qualify for the exemption, the debate had to be organized by someone other than a broadcaster and held in a location other than a broadcast studio. Id. at 354. The appearance was exempt if the decision to cover it was based on the broadcaster's good faith, reasonable news judgment, and not because the broadcaster sought to advance a particular candidacy. Id. at 359.

Seven years later, in Henry Geller, 95 F.C.C.2d 1236 (1983), aff'd, mem., League of Women Voters Educ. Fund v. FCC, 731 F.2d 995 (D.C. Cir. 1984), the FCC expanded the scope of the "on-the-

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3/ (...continued)

documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

spot" coverage exemption to include debates organized by broadcasters and held in broadcast studios. The FCC declared that, "it is clear that Congress intended to give broadcasters great discretion in their news programming decisions," 95 F.C.C.2d at 1242, and cited Chisholm for the proposition that, "`in order to facilitate broadcast coverage of political news, Congress knowingly faced risks of political favoritism by broadcasters, and opted in favor of broader coverage and increased broadcaster discretion.'" Id. (quoting Chisholm, 538 F.2d at 366).

A candidate not invited to a debate may complain to the FCC to challenge the debate's exempt status only by adducing evidence of bad faith -- that the licensee intended to advance a particular candidacy instead of basing its broadcast decision on a bona fide editorial judgment. The candidate satisfies this burden by providing "extrinsic evidence" that the licensee "acted in bad faith or that its motive . . . was to advance . . . [a particular] candidacy." Brown for President Comm., 75 F.C.C.2d 609, 613-14 (1980). If the candidate meets the burden, the broadcast is non-exempt, and the candidate is entitled to equal opportunities on the station or network. Andrew J. Watson, 26 F.C.C.2d 236 (1970); Constitutional Party and Frank W. Gaydosh, 14 F.C.C.2d 255, rev. denied, 14 F.C.C.2d 861 (1968); Conservative Party, 40 F.C.C. 1086 (1962).

The FCC consistently resolves candidates' complaints under Section 315(a)(4) by analyzing whether the broadcaster exercised good faith news judgment. This is true whether the broadcaster is commercial[4/] or noncommercial and, if the latter, whether a state-

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4/ Johnson v. FCC, 829 F.2d 157, 160-63 (D.C. Cir. 1987) (Citizens Party candidates' request to be included in broadcast political debate held "a demand for broadcast access," and inconsistent with Congress' decision to promote coverage of political news and First Amendment interest in preserving broadcasters' journalistic discretion); King Broadcasting Co. v. FCC, 860 F.2d 465 (D.C. Cir. 1988), on remand, 6 FCC Rcd 4998 (1991).

related[5/] or a community licensee.[6/] Protection of broadcast licensees' news judgment -- the good-faith exercise of editorial discretion -- is, therefore, maintained.

Furthermore, there is no private cause of action in federal court to enforce Section 315.[7/] Forbes, 22 F.3d at 1427. Instead, a plaintiff, like Forbes, must bring his claim before the FCC and then appeal it, if necessary, to the Court of Appeals. Id. Had Forbes brought his claim to the FCC, it would have been dismissed because AETN's broadcast of a political candidates' debate is considered "on-the-spot coverage of a bona fide news event." See Henry Geller, 95 F.C.C.2d at 1238. As such, AETN is exempt from having to provide equal opportunities to Forbes. Even if Forbes had challenged the

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5/ Jim Trinity, Letter, 7 FCC Rcd 3199 (1992) (state university licensee); Arthur R. Block, Letter, 7 FCC Rcd 1784 (1992) (community licensee and state university licensee).

6/ Cyril E. Sagan, 1 FCC Rcd 10 (1986) (community licensee).

7/ Section 315(d), 47 U.S.C. § 315(d), instructs the FCC to "prescribe appropriate rules and regulations to carry out the provisions" of Section 315. Courts repeatedly hold that the FCC is "the primary and exclusive forum in which to institute and prosecute alleged violations of section 315(a) by broadcast licensees." Ackerman v. Columbia Broadcasting Sys., Inc., 301 F. Supp. 628, 631 (S.D.N.Y. 1969); see also Lamb v. Griffin Television, Inc., 804 F. Supp. 1430, 1431 (W.D. Okla. 1992); Maher v. Sun Publications, Inc., 459 F. Supp. 353, 356 (D. Kan. 1978); Gordon v. National Broadcasting Co., 287 F. Supp. 452, 455 (S.D.N.Y. 1968) (equal time complaint "fatally defective in that it fails to allege that the plaintiff has availed himself of the primary and exclusive jurisdiction of the Federal Communications Commission"). No private cause of action exists to enforce Section 315. See, e.g., Belluso v. Turner Communications Corp., 633 F.2d 393, 397 (5th Cir. 1980)("creation of a private cause of action would be inconsistent with the clear legislative intent to centralize enforcement of the Act in the expert agency").

broadcast's exempt status, he would have been unsuccessful because he had no evidence of any discriminatory motive on the part of anyone at AETN. A.App. 88-89. Instead, the decision not to invite Forbes was a good-faith professional journalistic judgment. Tr. Trans. 206-207 (S. Howarth); Tr. Trans. 295-297 (A. Oliver).

4. Forbes Never Requested "Reasonable Access"

The Communications Act also specifies that every legally qualified federal candidate may request, and the broadcaster must grant, some program time under the "reasonable access" provision.[8/] 47 U.S.C. §312(a)(7)(1988). This was true of Forbes, whether or not he was entitled to "equal opportunities" as a result of the debate. See Political Primer 1984, 100 F.C.C.2d at 1479, 1523. On a noncommercial station or network such as AETC's, no charge can be made for the time granted under reasonable access. Even though Forbes was not entitled to participate in the debate, if he had made a reasonable access request to AETN, he would have been granted program time that he could have used as he saw fit, with no censorship by AETN. Id. at 1524.

However, Forbes requested only that he be allowed to participate in the debate. Contrary to the statement in this Court's

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8/ 47 U.S.C. § 312 (1988) provides, in part:

Administrative Sanctions

(a) The [Federal Communications] Commission may revoke any station license or construction permit --

. . .

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

earlier decision at footnote 4, Forbes, 22 F.3d at 1429-30 n.4, AETN never understood Forbes to request an opportunity to appear on AETN under reasonable access, separate and apart from the debate. Tr. Trans. 351-352 (O. Goss). In other words, Forbes never requested "reasonable access" within the meaning of Section 312(a)(7). Tr. Trans. 351-352 (O. Goss); Tr. Trans. 203-205 (S. Howarth); see also Tr. Trans. 157-164, 167 (R. Forbes) (Forbes has no written record of a request to AETN for time, other than the debate, to appear on AETN); (Forbes testified that the night of the debate he asked Mr. Goss for time to appear on AETN beside the debate. But, he also testified that it is "possible" that Mr. Goss may have thought that he was talking about being allowed to participate in the debate or about winning the lawsuit instead of being allowed time outside the debate. Forbes stated, "So we may not have been on the same wavelength, that is correct." A.App. 85.) AETN would have granted Forbes some broadcast time under Section 312(a)(7) if he had made a reasonable access request. Tr. Trans. 203-205 (S. Howarth).

B. The Constitutional Framework

This Court's earlier opinion holds that, "AETN must provide a rational and viewpoint-neutral justification for its determination [not to invite Forbes to the debate]." Forbes, 22 F.3d at 1430. Yet this Court emphasized that its approach was based on a sparse record, for AETN had not even answered Forbes' complaint. Id. Consequently, certain assumptions made by this Court should be revisited in light of the record developed since the en banc decision.

The foremost of those assumptions appears in this Court's analysis of the debate as a non-public forum:

> Since Forbes was a member of the class of speakers for whose benefit the debate was held (candidates for the Third Congressional seat), and he wished to address the topic encompassed by the debate (who should be elected to Congress), if AETN failed to include Forbes because of objections to his viewpoints, it has violated his First Amendment rights.

Id. at 1429. On this assumption, this Court stated that, because AETN had not yet articulated its reasons for not inviting Forbes to the debate, the District Court erred in dismissing Forbes' First Amendment claim under Rule 12(b)(6). Id. at 1430.

The record on summary judgment reveals that this key assumption -- that Forbes was a member of the class of speakers for whose benefit the debate was held -- is wrong. Rather, the testimony of Ms. Howarth and Ms. Oliver demonstrates that the debate was held to benefit AETN's viewers, many of whom would be voting in the election. Tr. Trans. 198-201, 207-208 (S. Howarth); Tr. Trans. 293, 298-299 (A. Oliver). This is consistent with AETN's purpose as reflected in the statute and the Programming Policy Statement. See Ark. Code Ann. § 6-3-105; A.App. 46 (Programming Policy Statement for AETN, Sections 10, 14). Further, Forbes testified that he knew nothing about the purpose or process of setting up the debate, so that he is unable to controvert the statements of Ms. Howarth and Ms. Oliver about the debate's purpose. See Tr. Trans. 165-167 (R. Forbes); A.App. 65-66, 84, 88.

The earlier record before this Court of Appeals also did not include AETC's Programming Policy Statement, emphasizing a program service tailored to the interests of AETN's viewers, nor the Statement of Principles of Editorial Integrity in Public Broadcasting. A.App. 32, 44.

How is this Court's analysis affected by the fact that the viewers, and not the candidates, constituted the class of the debate's intended beneficiaries? Does this alter the requirement for AETN to "provide a rational and viewpoint-neutral justification" for not inviting Forbes to the debate? And how does this fact alter this Court's reliance on Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 811 (1985), dealing with concerns over "'viewpoint-based discrimination,'" Forbes, 22 F.2d at 1430, quoting Cornelius, 473 U.S. at 811?

At the outset, there is no evidence that the debate was conceived or produced by AETN for the purpose of advancing a particular candidacy. See Brown for President Comm., 75 F.C.C.2d at 613-14. Because Forbes testified that he knew nothing about AETN's process in planning and producing the debate, and knew of no irregularities in AETN's decision-making process concerning the debate, A.App. 88, he could not have met the burden under FCC decisions of providing extrinsic evidence of broadcaster bad faith. That failure of proof would have barred a decision by the FCC that the debate was non-exempt under Section 315(a) of the Communications Act. So, had Forbes proceeded before the FCC, he would not have been entitled to equal opportunities on AETN. See Andrew J. Watson, 26 F.C.C.2d 236; Constitutional Party and Frank W. Gaydosh, 14 F.C.C.2d 255; Conservative Party, 40 F.C.C. 1086. (Of course, as a legally qualified federal candidate, Forbes would still have been entitled to some programming time had he asked AETN for "reasonable access" under 47 U.S.C. § 312(a)(7).)

Concomitantly, there is no evidence whatever that the decision maker, Ms. Howarth, or anyone who made recommendations to her about whether to invite Forbes, was subjected to any pressure from any political or administrative official of the State of Arkansas to include (or not include) Forbes in the debate. It is a record fact that the programming and editorial integrity policies adopted by AETC were followed in this case.

On these facts, this Court's test in Forbes is no longer appropriate. That is true despite the fact that AETN (and its advisor, Mr. Simmons) did not consider the views of Forbes or his opponents in deciding whom to invite to the debate. The reason is that AETN's invitations were still based on the viewpoints of professional journalists about the criteria to be used in selecting debate participants. The decision of AETN to produce election debates was the result of a viewpoint that debates would be beneficial to the citizens of Arkansas. Decisions about the format of the debates was the result of a viewpoint that that format would work best. Decisions to consider the candidates' standing in the polls, level of political activity, level of campaign contributions and expenditures, press coverage (or lack of it), and major-party support are all viewpoints,

or based on viewpoints, of professional journalists. The decision to invite only those candidates who had a practical chance of winning the election was the result of a viewpoint that limiting the participants that way would lead to more worthwhile debates for AETN's viewers. As a practical, and foreseeable, matter, the decision screened out the viewpoints of all but the major party candidates. And, of course, the decision about whether Forbes had a practical chance of winning was the result of a viewpoint that he did not have popular support among the voters of the Third District. While these criteria can to some extent be considered as objective, ultimately their use is essentially subjective. Indeed, these are precisely the kind of subjective editorial judgments that are protected under Columbia Broadcasting Sys. v. Democratic Nat'l Comm..

It is unclear from this Court's opinion whether these facts meet the test of "a rational and viewpoint-neutral justification," or whether this Court now will reformulate the test to tailor it to this record (particularly because Forbes cannot be considered in the class of intended beneficiaries of the debate). In considering these questions, this Court should look to decisions of the Supreme Court and of other Courts of Appeals that have analyzed whether state-owned public broadcasters can exercise editorial discretion to the same extent as non-state-owned broadcasters.

In FCC v. League of Women Voters, 468 U.S. 364 (1984), the Court held unconstitutional a statute that made editorializing illegal for noncommercial broadcasters that received funds from the Corporation for Public Broadcasting. The Court relied on Columbia Broadcasting Sys. v. Democratic Nat'l Comm. for the proposition that less drastic means were available to advance the public's interest against "lopsided presentations of narrow partisan positions" by public stations that received public funds. 468 U.S. at 397-98. The Court held that the editorializing ban was "not crafted with sufficient precision to remedy [the] dangers" of abuse from editorializing by public stations that received federal funds. Id. at 398. (The Court reached this conclusion even in light of the argument that stations owned by state governments were especially likely to broadcast views favorable to state authorities. Id. at 393.)

Moreover, in non-broadcast, non-public forum settings, the Court has been especially careful to tailor its formulation of access rights based on the particular characteristics of the non-public forum involved. For example, in Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983), where the Court denied a union access to a school district's mailbox system (a non-public forum), the Court explained:

> When speakers and subjects are similarly situated, the State may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate the special purpose for which the property is used. As we have explained above, for a school mail facility, the difference in status between the exclusive bargaining representative and its rival is such a distinction.

Id. at 55. The task here is to determine on this record what criteria AETC, a state-owned public broadcasting licensee, may use to make distinctions about the speech on AETN.

This general question has attended public broadcasting for more than two decades. See generally, Canby, "The First Amendment and the State as Editor: Implications for Public Broadcasting," 52 Texas L. Rev. 1123 (1974) (quoted in FCC v. League of Women Voters, 468 U.S. at 392 n.21.). In each case, it requires resolving the tension between the state-owned public broadcaster's First Amendment and Communications Act rights to exercise editorial discretion, on the one hand, and the First Amendment rights of individuals to be free from content-based discrimination by the government, on the other. See generally, Chandler v. Georgia Pub. Telecommunications Comm'n, 917 F.2d 486 (11th Cir. 1990), cert. denied, 112 S. Ct. 71 (1991); Schneider v. Indian River Community College Found., Inc., 875 F.2d 1537 (11th Cir. 1989); Muir, 688 F.2d 1033; Community-Serv. Broadcasting, 593 F.2d 1102.

All of these cases deal with challenges to the right of state-entity public broadcast licensees to make the same kind of unfettered editorial decisions that are, under Columbia Broadcasting Sys. v. Democratic Nat'l Comm., the acknowledged right of commercial broadcasters and of public, non-state entity broadcast licensees. The cases are consistent in upholding the editorial prerogatives of state-owned licensees, and are helpful in analyzing the record here.

Of these cases, only Chandler closely parallels the facts of this case, holding that the executive director of Georgia's state-owned public television network could make a "content-based" decision to air a debate only between the major party candidates for lieutenant governor, and exclude the Libertarian candidate. 917 F.2d at 488-89 (majority), 491, 493 (dissent). The dissent in Chandler, which argued that the Georgia network had "already decided to give over its airwaves to political contenders for the offices [in question]," Id. at 493, is worth noting for its contrast to the facts of the instant case (as well as to the facts found by the Chandler majority). The record demonstrates that AETN decided to broadcast debates that offered viewers the opportunity for an in-depth look at the opinions of those candidates for federal office who had a reasonable likelihood of winning election. That required AETN to make editorial decisions about which candidates to invite. AETN did not at any time decide to hold debates among all legally qualified candidates for the federal offices in contest in 1992.

Chandler relied on Schneider and Muir for the analytical approach necessary to tailor the forum analysis in Cornelius to the facts of the Georgia television debate. 917 F.2d at 488-89 & n.3. The Schneider court, noting that Judge Rubin's opinion in Muir was controlling, 875 F.2d at 1541, held:

> It is clear that Congress concluded that the First Amendment rights of public television viewers . . . .are adequately protected under a system where the broadcast licensee has sole programming discretion but is under an obligation to serve the public interest.

875 F.2d at 1541 (footnote omitted).

In Muir, which upheld state-owned public television licensees' rights to decline to broadcast the program, "Death of a Princess," Judge Rubin began by noting that First Amendment limitations imposed under traditional forum analysis, or under time, place, and manner doctrine, cannot simply be transferred to a medium of communication such as television:

> The limitations imposed by the first amendment on the operation of a medium of communication cannot be determined by application of the rules governing freedom of expression in streets and other areas that by tradition or design serve as platforms for expression subject only to reasonable time, place, and manner restrictions and free from content control.

688 F.2d at 1048. Citing Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), he explained:

> Determination of the constitutional limitations that result because a television licensee is a state agency rather than a private agency must take into account not only the rights of viewers but a number of other considerations. The license is federally bestowed. The state agency licensee has both a statutory duty to comply with the rules and regulations governing the use of its license and, like other licensees, the statutory right to determine the ways in which it shall fulfill that duty.
>
> . . . .
>
> Even the fact that the state is engaged in television broadcasting does not fully define the constitutional limitations on its actions, for such broadcasting might be designed to serve

> differing purposes. Licensing is not destiny. That the state is the licensee does not predetermine the station's function. The state may elect the station's mission, so long as this mission is consistent with the station's license and the Constitution. The prerogatives of managers, editors, and programmers, the rights of access of those who seek exposure, and the rights of viewers, as well as the prerogatives of the licensee itself as a state agency, are at least in large part determined by this mission.

Id. at 1049 (emphasis supplied).

Here, the Arkansas legislature selected AETC's mission as making the benefits of educational television available to inhabitants of Arkansas. Ark. Code Ann. §§ 6-3-101, 6-3-105(a). Under this statute, AETC adopted programming and editorial polices designed to benefit the people of Arkansas by ensuring the editorial independence of the professional programmers at AETN, and delegated final authority for editorial decisions to AETC's Executive Director, Ms. Howarth. In sum, the state has selected the mission of AETC as that of a journalistic enterprise, the editorial processes of which are protected by organizational structure and policy from interference by the political and administrative agents of the state. AETC's officially adopted policies show the intention to take on the full measure of licensee responsibility required by the FCC under the public interest standard of Section 309 of the Communications Act – the obligation to exercise unfettered programming discretion.

In this way AETN, like the Georgia network in Chandler, consistently with the First Amendment, is enabled to make content-based editorial judgments. Because of its structure and policies, AETN's programming decisions, like those of the Georgia network, fall under the category of good faith, bona fide editorial judgment, rather than under the category of censorship or discrimination:

> It is clear that [the Georgia Public Television Commission] `regulated content' by making a

> decision to air debates between candidates of the major parties. . . . [H]owever, this content-based decision is not viewpoint restrictive and does not violate the First Amendment. As noted above, GPTC makes content-based decisions on a regular basis to serve Georgians. A decision to air any show is necessarily content-based. GPTC chose to air a debate between only the Democratic and Republican candidates because it believed such a debate would be of the most interest and benefit to the citizens of Georgia. Such a decision promoted GPTC's function, was `reasonable' and was `not an effort to suppress expression merely because public officials oppose the speaker's views.'

917 F.2d at 489, citing Cornelius, 473 U.S. at 800.

If AETN's programming decisions about the debate had been influenced by political pressure from the state, the result would be different. Under those circumstances, AETN could no longer claim the protection of the First Amendment, because AETN would no longer be functioning as an editorial entity that is kept independent of the state's political influence. Instead, it would be functioning as part of the state's political apparatus. See Muir, 688 F.2d at 1050 (opinion of Rubin, J.); Chandler, 917 F.2d at 488; see also Rosenberger v. Rector and Visitors of the University of Virginia, 115 S.Ct. 2510, 2516-17 (1995) (discussing "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created"); Lamb's Chapel v. Center Moriches Union Free School District, 113 S. Ct. 2141, 2147 (1993) (analyzing Cornelius' approval of governmental control over access to a non-public forum if the restrictions are reasonable in light of the forum's purpose and viewpoint-neutral). Here, the statute enacted by the Arkansas legislature and the policies on editorial integrity adopted by AETC satisfy both tests. They are reasonable because they empower the professional journalists at AETN to exercise the programming discretion necessary to satisfy Communications Act requirements,

and they are viewpoint-neutral because they do not direct the professional staff to make programming judgments according to any state-imposed viewpoint.

If AETN operated as part of Arkansas' political apparatus, then all of AETN's editorial judgments would be subject to scrutiny for censorship or discrimination, that is, for potential violation of the First Amendment rights of anyone who complained. Every journalistic decision would be open to challenge in court. See Chandler, 917 F.2d at 489-90. As a practical matter and as a matter of law, AETN would no longer be able to exercise the unfettered editorial discretion that is a necessary attribute of any broadcast licensee under the FCC's well-established regulatory policies. In other words, if AETN's editorial functioning were not insulated from the state, AETN would perforce, inescapably, be disqualified from remaining a broadcast licensee under the Communications Act.

This analytical path demonstrates that potential First Amendment abuse by state-owned public broadcast licensees is not beyond remedy by the courts. See Id. at 489 (finding no pervasive policy or practice "'lending a constitutionally impermissible, discriminatory bias to the station's mission,'" citing Schneider, 875 F.2d at 1541). However, the predicate condition of political (or administrative) involvement by the state in the broadcast licensee's editorial processes must first be alleged and demonstrated. Forbes makes no such predicate showing, and testified in trial and in his deposition that he knows of no facts or witnesses who could support such a showing.

The FCC's doctrine, enunciated in such cases as Brown for President Comm., 75 F.C.C.2d at 613-14; Andrew J. Watson, 26 F.C.C.2d 236; Constitutional Party and Frank W. Gaydosh, 14 F.C.C.2d 255; and Conservative Party, 40 F.C.C. 1086, requires a complainant to make an initial proffer of "extrinsic evidence" that a licensee acted in bad faith, with a motive to advance a particular candidacy, in order to show that a political debate is not exempt from equal opportunities.

This Court should discard its test requiring AETN to "provide a rational and viewpoint-neutral justification" for its decision not to invite Forbes, and adopt instead a test based on a threshold showing of political interference by the state in the broadcasting entity's editorial processes. That is a less restrictive means for reviewing a state-owned broadcast licensee's exercise of its First Amendment and Communications Act rights to make unhindered editorial decisions. See FCC v. League of Women Voters, 468 U.S. at 395; Muir, 688 F.2d at 1052-53 (concurrence) (discussing the disruptive effects on licensee discretion of court reassessment of editorial decisions); Community-Serv. Broadcasting, 593 F.2d at 1118 & n.38. This approach offers the best method for reconciling the potentially conflicting First Amendment rights at issue when a complaint is made about the programming decisions of state-owned public broadcasting licensees.

C. Protection of AETN's Exercise of Editorial Discretion in this Case

The decision not to invite Forbes to the debate was the result of a professional journalistic judgment that it was in the best interest of AETN's viewers to limit participation to candidates who had a realistic chance of winning the election, and that Forbes was not such a candidate. Tr. Trans. 206-208 (S. Howarth); Tr. Trans. 293, 298-299 (A. Oliver). The decision was based on estimating Forbes' support among the voters of the Third Congressional District. Tr. Trans. 198-201 (S. Howarth); Tr. Trans. 295, 303-304 (A. Oliver). It was not based in any way on Forbes' views. It was not based on hostility toward his views or on favoritism for the views of his opponents. Tr. Trans. 210-211 (S. Howarth); Tr. Trans. 295-296 (A. Oliver). Moreover, it was not the result of political or administrative pressure from the state. Tr. Trans. 209-210 (S. Howarth); Tr. Trans. 304-305 (A. Oliver). Forbes has no evidence to the contrary. He has no knowledge of any irregularity in the decision-making process, any bad faith or bias, or any political interference. A.App. 64-65, 82-83, 84, 86-87, 88, 89, 93, 94.

Thus, the uncontroverted evidence proves that AETN's decision not to invite Forbes was a decision not influenced by political

pressures. Rather, it was the result of a decision of AETN's professional staff, based on their good-faith editorial judgment.

II. PRECEDENT SUPPORTS THE DISTRICT COURT'S USE OF A SPECIAL VERDICT FORM, THE JURY INSTRUCTIONS USED, EXCLUSION OF CERTAIN EVIDENCE, AND REFUSAL TO INSTRUCT ON PUNITIVE DAMAGES, ALL AS CHALLENGED BY FORBES.

A. The Special Verdict Form

At the end of trial, the District Court submitted to the jury a special verdict form consisting of three interrogatories. Tr. Trans. 475. The first asked, "Do you find from a preponderance of the evidence that the defendants' decision to exclude Mr. Forbes from the debate was influenced in any way by political pressures from anyone inside or outside of the Arkansas Educational Television Network?" Id. The jury answered "no." Id. at 502. The second interrogatory asked the jury, "Do you find from a preponderance of the evidence that the defendants excluded Mr. Forbes from the political debate because of objections or opposition to his views?" Id. at 475. The jury also responded "no" to this question. Id. at 502. The final interrogatory concerned damages. Because the jury was instructed only to answer this question if they answered interrogatory two in the affirmative, the jury did not respond to the third interrogatory.

Forbes claims that the District Court erred in submitting interrogatory number one to the jury. He argues that this interrogatory was unnecessary to a finding that AETN violated his First Amendment rights, and that the effect of the question was to confuse the jury and prevent them from rendering a verdict in his favor. Appellant's Brief at 1. Forbes asserts the jury likely believed that they had to answer yes to interrogatory one and find that there was political pressure placed on AETN in order to answer yes to interrogatory two and find that AETN excluded Forbes from the debate because of his views. Id. at 1-2. Thus, Forbes argues that interrogatory one tainted the jury's verdict. However, neither the record nor the precedent Forbes cites support this conclusion.

Forbes points to David v. Merrill Lynch, Pierce, Fenner & Smith for the proposition that, "where possible, it is preferable that juries be given special verdict forms to facilitate effective appellate review." 906 F.2d 1206, 1220 (8th Cir. 1990)(finding that use of a general rather than a special verdict was not an abuse of discretion or reversible error). Forbes also relies on McDonnell v. Timmerman, which states that a trial court has discretion both as to "whether or not to utilize a special verdict," and as to "the form of the submitted interrogatories." 269 F.2d 54, 58 (8th Cir. 1959). Forbes also states that this circuit holds that a trial court's discretion in framing the special verdict's interrogatories "does not warrant withdrawing from the jury valid theories of recovery upon which a plaintiff has produced sufficient evidence." Commerford v. Olson, 794 F.2d 1319, 1323 (8th Cir. 1986).

Contrary to Forbes' argument, these cases support the District Court's decision to submit interrogatories one and two to the jury. The use of special verdict forms is preferred because it facilitates appellate review. David, 906 F.2d at 1220. The ease of appellate review was the District Court's stated purpose in submitting both interrogatories to the jury in this case. Tr. Trans. 429. The District Court sought to assure that the record contained the jury's findings both as to the question of political pressure on AETN and the possibility that AETN's decision-makers excluded Forbes because of his views. Id. By having both interrogatories answered, the District Court bolstered the specificity of factual findings available for this appeal. Id. at 430.

The District Court avoided the type of error that caused reversal in the case of Commerford v. Olson. There the plaintiff submitted evidence supporting two vicarious liability theories, one based on employment principles and the other on principles of apparent agency. Commerford, 794 F.2d at 1321. The court found error in having the special verdict interrogatories only address one of the two theories, rather than both. Id. at 1323. The District Court below avoided this possible error by submitting interrogatories on both AETN's theories.

Other cases Forbes lists are not analogous to the instant case. For example, in Silor v. Romero, 868 F.2d 1419 (5th Cir. 1989), the Court of Appeals, reviewing one of the special verdict questions, found that the trial court had misstated the applicable law on damages. Because the Court of Appeals found it "impossible to determine the extent to which the jury impermissibly compensated [Silor]," it reversed and remanded the matter for a new trial on damages. 868 F.2d at 1422. However, the District Court in Forbes did not misstate the law.

Forbes relies on Prudential Ins. Co. v. Morrow, 339 F.2d 411 (5th Cir. 1964). Appellant's Brief at 2-3. In Prudential, the issue was the enforcement of an insurance policy. 339 F.2d at 412. There were three primary factual issues to be submitted to the jury. Id. Instead of submitting three separate interrogatories, the District Court combined two issues into one interrogatory, and submitted only two interrogatories to the jury. Id. The Court of Appeals found that the combination was "duplicitous and confusing." Id. Prudential does not apply to the Forbes case, because the District Court submitted separate interrogatories on the two issues that the jury needed to consider, so that there would be an unequivocal finding on each.

Forbes points to Martin v. Gulf States Utils. Co., 344 F.2d 34 (5th Cir. 1965), where interrogatories submitted to the jury were so inconsistent and confusing that the jury was incapable of rendering "a verdict in accordance with the convictions which they held." 344 F.2d at 37. The Court of Appeals found that the misleading and confusing nature of the interrogatories was indicated by inconsistent answers from the jury, and by the jury's asking for guidance and clarification numerous times during deliberations. Id. In contrast, the questions submitted to the Forbes jury did not lead to inconsistent responses, and the jury did not require clarification during deliberations.

In Scott v. Isbrandtsen Co., 327 F.2d 113, 119-123 (4th Cir. 1964), Appellant's Brief at 3, the first interrogatory was phrased so that it was open to several possible interpretations. The Court of Appeals found that the jury's response to this interrogatory prevented fair consideration of the plaintiff's case. Scott, 327 F.2d at 123.

Unlike Scott, the wording of interrogatories in Forbes was not open to several misleading interpretations. Instead, the Forbes interrogatories fall within the Scott court's instructions about proper special verdict questions: "[Q]uestions should be simple and clear, with one single issue in each question. Double questions, or questions in the alternative, should be avoided." Scott 327 F.2d at 122-123.

United States Fire Ins. Co. v. Pressed Steel Tank Co., Inc., 852 F.2d 313 (7th Cir. 1988), on which Forbes relies, Appellant's Brief at 3, actually supports the District Court in this case. In U.S. Fire Ins. Co., the appellate court found that the lower court's special verdict questions were flawed because they did not submit all the material issues to the jury. 852 F.2d at 318. However, in Forbes, the District Court presented all material issues to the jury by asking both if political pressure had been applied to AETN and if AETN had not invited Forbes because of his views.

In Solis v. Rio Grande City Indep. Schools, 734 F.2d 243 (5th Cir. 1984), Appellant's Brief at 3, the special verdict interrogatory was flawed because it only asked the jury to consider the first question of the two-pronged Mt. Healthy test for reviewing public employees' First Amendment challenges to employment decisions. Solis, 734 F.2d at 246. The trial court in Forbes did not commit any such error.

Forbes inaccurately describes the holding in Wirtz v. International Harvester Co., 331 F.2d 462, 466 (5th Cir. 1964), cert. denied, 379 U.S. 845 (1964), where the court found error in a special verdict question that failed to use the precise statutory terminology applicable to a labor dispute. Wirtz is inapplicable because the jury questions in Forbes did not involve statutory language.

Forbes also argues that this case is unlike Economy Fire & Casualty v. Tri-State Ins. Co., 827 F.2d 373 (8th Cir. 1987), and Kostelecky v. NL Acme Tool, 837 F.2d 828 (8th Cir. 1988), each holding special verdict questions to be adequate. Both courts found that interrogatories submitted to juries were not misleading because they allowed the juries to review all the material facts at issue and

come to a conclusion on each issue. Economy Fire & Casualty, 827 F.2d at 376; Kostelecky, 837 F.2d at 832. Similarly, the interrogatories in Forbes required the jury to consider AETN's two distinct theories and come to a separate conclusion on each. There were no instructions linking the two questions together, nor any indication whatever that, if the jury answered no to interrogatory one, they had to answer no to interrogatory two. Moreover, the special verdict interrogatories assured precise findings of fact for appellate review.

B. Exclusion of Evidence Regarding Steve Barnes

Forbes also challenges the District Court's refusal to admit evidence of Steve Barnes' hostile attitude towards Forbes' views. Steve Barnes is the husband of Amy Oliver, who made the recommendation to Susan Howarth that Forbes not be invited to AETN's debate. Forbes contends that Barnes' hostility affected Oliver's decision to recommend against inviting Forbes. Appellant's Brief at 32. As evidence of Barnes' hostility, Forbes proffered only his own testimony and a videotape that was represented by Forbes to show Barnes' agitation when Forbes won the 1990 Republican primary for Lieutenant Governor. Tr. Trans. 404. The District Court ruled that the proffered evidence was irrelevant. Id.

Forbes contends that Adams v. Fuqua Indus., Inc., 820 F.2d 271 (8th Cir. 1987), Appellant's Brief at 32, sets out the standard of review of decisions on admissibility of evidence:

> We may only reverse a trial court's determination of the admissibility of evidence where there has been a clear abuse of discretion. Where the District Court excludes evidence of a critical nature, so that there is no reasonable assurance that the jury would have reached the same conclusion had the evidence been admitted, the trial court has abused its discretion.

Adams, 820 F.2d at 273.

Adams was a products liability suit. The trial court did not allow the defendant to present rebuttal evidence to show that improvements the plaintiff claimed should have been to the product were unavailable when the product was made. Adams, 820 F.2d at 275. Unlike Adams, where the excluded evidence was critical to the defen[illegible]t's case, Forbes could not show that the evidence about Barnes was even marginally relevant, much less critical, to his case. Forbes could not prove that Oliver was aware of her husband's opinions regarding Forbes, or that Oliver had ever seen the videotape of Barnes that he wished to present, Tr. Trans. 323-25; so he could not show that Barnes' attitude affected Oliver's views or contributed at all to her recommendation against inviting Forbes to the debate. Under these circumstances, the District Court's exclusion was not a clear abuse of discretion, and should not be reversed.

Forbes also erroneously relies on Giove v. Stanko, 977 F.2d 413 (8th Cir. 1992), to support his claim that proof of Barnes' hostility would prove bias on the part of Barnes' wife, Oliver. Giove v. Stanko was a suit against a woman whose husband had defrauded his creditors. 977 F.2d at 415-416. The court found that the wife was part of the fraud, so that any transfer of property from her husband to her was void. Id. at 416-417. The husband's affidavit was admissible to prove his fraudulent intent in hiding assets from his creditors. Id. at 417. However, the court did not state that the affidavit was proof of the wife's fraudulent intent. The court found other evidence to show that the wife was aware of and involved in the fraud. Id. Thus, Giove does not support Forbes' argument that evidence of a husband's state of mind is admissible to prove his wife's state of mind.

Forbes also relies on Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993). Daubert concerned the appropriate standard for admissibility of scientific evidence, and thus is not directly applicable here. However, the Court states that the Federal Rules of Evidence have a liberal relevancy standard, and that, under Rule 401, relevant evidence is defined as "that which has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" Daubert 113 S. Ct. at 2794 (citing Rule 401). Even

so, Forbes has not shown that evidence of Barnes' hostility is linked even tenuously to AETN's decision not to invite Forbes to the debate.

C. Refusal to Instruct the Jury on Punitive Damages

Forbes also claims that the District Court erred by not instructing the jury that they could award punitive damages. The general rule of the cases in Forbes' brief is that a jury can award punitive damages to redress a malicious or intentional violation of a person's constitutional rights by a government official. Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978) (review of the damages award in a §1983 suit regarding the due process rights of suspended public school students); Carlson v. Green, 446 U.S. 14, 22 (1980) (review of one's ability to recover damages in a Bivens suit); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-267 (1981) (review of one's ability to obtain punitive damages against a municipality in a §1983 suit). The purpose of punitive damages is to punish the government actor for her malicious conduct and to deter others from engaging in similar conduct. Carey, 435 U.S. at 257, n.11.; City of Newport, 453 U.S. at 267-268.

However, Forbes submitted no evidence that any of the individual defendants maliciously or intentionally denied him his rights. The Court in Carey stated that punitive damages are not appropriate when there is no specific finding that defendants acted with "malicious intention to deprive [plaintiffs] of their rights or to do them other injury." Carey 435 U.S. at 257 n.11. Thus, the District Court did not err in refusing to instruct the jury on punitive damages.

CONCLUSION

Under the First Amendment and the Communications Act, AETN should not be required to present a rational, viewpoint-neutral justification for its editorial decisions about the 1992 debate. Rather, this Court should reconsider it earlier en banc decision, and hold that a state-entity public broadcast licensee has the same editorial prerogatives as non-state-entity public broadcast licensees and commercial licensees. Only if the state exerts political pressure to

interfere with the state-entity licensee's editorial processes, as carried out by the professional editors charged with making day-to-day programming decisions, would the First Amendment mandate a different result.

The jury found, and a careful study of the record confirms, that there is no evidence in this case of political interference by the State of Arkansas with AETN's journalistic decisions about the 1992 debate. Consequently, the District Court's instructions to the jury and its use of a special verdict form were proper. The decision below should be affirmed.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that, this 20th day of November, 1995, true copies of the Brief and Appendix of the AETN Defendants in this case were sent by prepaid, First Class U.S. mail or delivered by hand to the following:

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